IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JOCELYN TOMPKIN, ETC., ET AL.,)
)
Plaintiffs,) Judge David D. Dowd, Jr.
) Akron, Ohio
vs.)
) Civil Action
AMERICAN BRANDS, INC., ET AL.,) Number 5:94CV1302
)
Defendants.)

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TRANSCRIPT OF TRIAL PROCEEDINGS HAD BEFORE

THE HONORABLE DAVID D. DOWD, JR.,

JUDGE OF SAID COURT, AND A JURY,

ON TUESDAY, SEPTEMBER 25, 2001.

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VOLUME 2

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Proceedings recorded by mechanical stenography; transcript produced by computer-aided transcription.

THE COURT: Please be seated.
We are not ready to start yet.
(Pause).
Let the record show that the jury has not been brought to the courtroom yet because we are still missing three jurors as of a couple minutes ago.
I'm ready now to, as soon as the jury comes in, give them the preliminary jury instructions and then turn it over for opening statements.
This is the point where I would distribute the stipulation which I have directed the parties to file. We have no stipulation of fact, undisputed fact, and I assume there is none.
MR. COFER: That is correct, Your Honor. There is no stipulation.
THE COURT: Thank you. That is a factor that will weigh heavily in any request for additional time.
As usual, the ones closest to the courthouse are the last ones to arrive. The lady from Holmesville was here at 8:30, 61 miles away.
Counsel want to come forward, see this letter? (Handing).
It's the kind of stuff I always run into in a long case. Why is a hospital saying a juror is indispensable to a hospital? They are a day late and a

dollar short as far as I'm concerned. As soon as I let one off, then I'll have an avalanche. So I'm going to call the hospital and tell them, life is tough.
You might call the director and tell him that it comes too late, she will not be excused.
THE CLERK: Should I do that now?
THE COURT: Well, sometime during the day.
THE CLERK: Okay.
THE COURT: Bring the jury in, please.
MR. COFER: Your Honor, with the Court's permission, I was going to sit over there to watch Mr. Smith's opening.
THE COURT: I don't care. Wherever.
I don't want something on that that blocks me from the jury.
MR. SMITH: Yes, sir.
THE COURT: We had that discussion before you arrived. They had something they wanted to do.

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So anything -- I want nothing to obstruct my vision of the jury.

(Jury in).

THE COURT: Please be seated.

Members of the jury, now that you have been sworn, I would give you some preliminary instructions to guide you in your participation in the trial.

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Duty of jury. It will be your duty to find from the evidence what the facts are. You and you alone will be the Judges of the facts. You will then have to apply to those facts the law as the Court will give it to you. You must follow that law whether you agree with it or not.

Nothing the Court may say or do during the course of trial is intended to indicate or should be taken by you as indicating what your verdict should be.

Evidence. The evidence from which you will find the facts will consist of the testimony of witnesses, documents and other things received into the record as exhibits, and any facts that the lawyers agree to or stipulate to or that the Court may instruct you to find.

Now, certain things are not evidence, and must not be considered by you as evidence. I'll list them for you now.

First, the opening statements of counsel, which will follow closely, do not constitute evidence. And then the final arguments that the lawyers will give after all the testimony is in do not constitute evidence.

The evidence comes from the witness stand and from the exhibits that are admitted into the record.

Questions by lawyers are not evidence, and you have to watch that fairly closely because there's two

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types of question: There's direct examination and cross-examination.

Direct examination is conducted by the party who calls the witness, and where the party who calls the witness is limited to the type of questions that they can ask, we refer to them sometimes as the who, what, why, where, when and what happened next questions.

But the question should not suggest the answer on direct examination.

It all changes on cross-examination. The cross-examiner is allowed to suggest the answer in his question or her question.

I'll give you a really good example of the difference between direct and cross-examination. A direct examination question would be "What day of the week is today?" Now, you've got seven choices. There's nothing in the question that suggests the day.

The cross-examination question would be "Sir, do you agree with me that today is Tuesday?" So you have suggested the answer.

And the point I'm trying to make is that facts that are -- or information that lawyers put in a question on cross-examination does not constitute evidence if the witness doesn't agree with it. And you have to watch that, because lawyers are very skillful at trying

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sometimes to get in testimony that simply isn't permitted. We see it all the time in television programs, the smart lawyers will ask a question and there is an objection and

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sustained, but then the lawyer will kind of smirk like he really told the jury what the evidence was.

That's just not proper. So keep that in mind, that the questions of the lawyers are not evidence unless the lawyer -- excuse me -- unless the witness agrees with the proposition in the question.

Objections to questions are not evidence. Lawyers have an obligation to their clients to make objections when they believe the evidence is being offered improperly under the Rules of Evidence. You should not be influenced by the objection or by the Court's ruling on the objection.

If, for instance, a question is asked, the lawyer says, an opposing lawyer says "Object," and I say "Overruled," that means the witness is to answer the question. Don't treat the answer any more importantly than if there had been no objection.

By the same token, if I say "Sustained," that means the witness is not to answer the question. Don't speculate on what the witness might have said had I allowed the question to be answered.

Now, testimony that the Court has excluded or

told you to disregard is not evidence and must not be considered. Anything you may see or hear outside the courtroom is not evidence and must be disregarded.

You are to decide the case solely on the evidence presented here in the courtroom.

I have indicated that the cafeteria downstairs is a very convenient place to eat given the short amount of time I'll allow for lunch, and I expect the lawyers and the parties may also be down in the cafeteria from time to time. If you overhear something that's said, ignore it because it's not in the courtroom, it doesn't count. Remember that only what you hear in the courtroom counts as evidence; nothing else.

Now, there are two kinds of evidence, direct and circumstantial. Direct evidence is direct proof of a fact such as the testimony of an eyewitness. Circumstantial evidence is proof of facts from which you may infer or conclude that other facts exist.

I will give you further instructions on these as well as other matters at the end of the case, but keep in mind that you may consider both kinds of evidence.

It will be for you to decide which witnesses to believe, which witnesses not to believe, and how much of any witness's testimony to accept or reject. I will give you some guidelines for determining the credibility of

witnesses at the end of the case.

Burden of proof. This is a civil case. The plaintiff has the burden of proving her case by what's called the preponderance of the evidence. That means the plaintiff has to produce evidence which, considered in the light of all the facts, leads you to believe that what the plaintiff claims is more likely true than not.

To put it differently, if you were to put the plaintiff's and the defendants' evidence on the opposite sides of the scales, the plaintiff would have to make the scales tip somewhat on her side. If the plaintiff fails to meet this burden, the verdict must be for the defendant.

Each defendant claims certain affirmative defenses. The burden of proving an affirmative defense by

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a preponderance of the evidence is on each defendant.

Those of you who have sat on criminal cases will have heard of proof beyond a reasonable doubt. That requirement does not apply to a civil case; therefore, you should put it out of your mind.

Summary of the case. I will give you detailed instructions on the law at the end of the case, and those instructions will control your deliberations and decision. But in order to help you follow the evidence, I will give you now a brief summary of the elements which the plaintiff must prove to make her case.

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The case began in 1994 and was filed by David Tompkin and Jocelyn Tompkin against the defendant companies hereafter named. After David Tompkin's death on February 12th, 1996, his widow Jocelyn Tompkin was appointed as administratrix of the estate of David Tompkin. An amended complaint was filed by Jocelyn Tompkin in her capacity as administratrix and also on her behalf personally for her loss of consortium claim.

The defendants in this matter are Philip Morris Inc., Liggett Group Inc., Lorillard Tobacco Company and the American Tobacco Company, all of which manufacture and sell tobacco products; in particular, cigarettes.

David Tompkin allegedly smoked various brands of cigarettes from 1950 to 1965 when he stopped smoking. As indicated, David Tompkin died from lung cancer on February 12th, 1996, about 20 months after this lawsuit was filed.

In the amended complaint, Jocelyn Tompkin alleged the following claims: A design defect claim under the Ohio Products Liability Act; a failure to warn claim under the same Act; and a breach of an implied warranty in tort.

She seeks to recover for David Tompkin's pain and suffering caused by lung cancer injury prior to his death, for the death itself which she alleges to be a

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wrongful death resulting from his use of the defendants' allegedly defective tobacco products, and for her own loss of consortium prior to his death.

You will have to decide whether or not each of the defendants violated the Ohio Products Liability Act or engaged in a breach of an implied warranty in tort, so as to be liable to the plaintiff.

To establish a claim under the Ohio Products Liability Act, the plaintiff must show by a preponderance of the evidence that, as to each defendant: One, that during his lifetime, the decedent David Tompkin smoked cigarettes produced by the defendant; two, that the cigarette brand produced by that defendant was defective in design or due to the inadequacy of warning; and, three, that smoking the cigarettes produced by the defendant in question was a proximate cause of the suffering and death of David Tompkin.

To establish a claim for breach of implied warranty in tort, the plaintiff must prove as to each defendant the following elements of the claim: One, the defendant sold its cigarettes in a defective condition that made them unreasonably dangerous to David Tompkin; two, the defendant engaged in the business of selling cigarettes; three, the cigarettes were expected to and did reach David Tompkin without substantial change in the condition in

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which they were sold; and, four, the defect was a direct and proximate cause of David Tompkin's injuries.

If you ultimately decide that plaintiff has proven either of the claims by a preponderance of the evidence, then you will also have to decide the amount of damages, if any, to which the plaintiff is entitled.

If you reach the issue of damages, there will be three components of damages to consider. First, damages for the pain and suffering of David Tompkin due to lung cancer injury prior to his death. Second, damages for the wrongful death. And, third, damages for the loss of consortium claim of Jocelyn Tompkin.

Conduct of the jury. Now, a few words about your conduct as jurors.

First, I instruct you that during the trial, you are not to discuss the case with anyone or permit anyone to discuss it with you. Until you retire to the jury room at the end of the case to deliberate on your verdict, you are simply not to talk about the case.

Second, do not read or listen to anything touching on this case in any way. If anyone should try to talk to you about this case, bring that fact to my attention promptly. Do not wait. Come to me.

Third, do not -- I don't think that will happen, but if it does, that's the school solution, tell me

about it.

Third, do not try to do any research or make any investigation about the case on your own.

Finally, do not form any opinions until all the evidence is in. Keep an open mind until you start your deliberations at the end of the case.

Now, we are going to give each of you a notebook, and you, if you wish, you may take notes. Now, there's no requirement you take notes, and about half the jurors take notes and about half don't. That's a matter for you to decide. But if you do take notes, as I indicated, leave your notebook in the jury room when you leave at night. You might put your name on the notebook so you'll know which is yours. And remember that they are for your own personal use; not for bringing them out during deliberations and arguing about who's got the best notes or comparing the various notes. They are not for that purpose.

The course -- do you want to hand them out, now, please, Debbie?

What you might want to do is, after you've finished the preliminary jury instructions, you might want to fold them up and kind of put them in your notebook so if later on you want to refer back to them, they are there. But you should not spend a great amount of time looking at

them, but from time to time they might be available for reference, if you feel inclined to refer to them.

Course of the trial. The trial will now begin. First, each side may make an opening statement. An opening statement is neither evidence nor argument; it is an outline of what that party intends to prove, offered to help you follow the evidence.

Next, the plaintiff will present her witnesses, and the defendants may cross-examine them. Then the defendants will present their witnesses, and the

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plaintiff may cross-examine the defense witnesses.
Then, contrary to what it says here, I'll first give you instructions of the law and then the lawyers will argue the case at the end of the trial, and after all that's been done, you'll then retire to deliberate on your verdict. That's obviously some time away, but that's the course of the trial.
Now, we are ready for opening statements.
I want you to bear in mind, as I indicated, the opening statements are simply a preview of what each party intends to produce by way of testimony. They do not constitute evidence, but I think you'll find them helpful so you'll have a better idea of what's to come. And it will probably make it easier for you to follow the testimony as it's presented in what will be obviously a

lengthy trial.
Counsel for plaintiff may proceed.
MR. SMITH: Thank you, Your Honor.
If we might have one minute to put our --
THE COURT: Sure.
(Pause).
MR. MILLIMAN: Your Honor, would it be okay if we moved somewhere so we can see these?
THE COURT: Well, I'd like to see them, too, but it's obvious they are not positioned for me to do that.
MR. SMITH: Your Honor, I'm going to position them where we can put them in here, but we will have the Elmo in the way.
THE COURT: Are you going to use the Elmo also?
MR. SMITH: A little bit, although --
THE COURT: It's a small courtroom and we do the best we can.
MR. SMITH: I'll tell you what, Your Honor, with your permission --
THE COURT: No, what I'm going to do is go down and sit with the jury, and that's one way I'll be able to watch.
MR. SMITH: I appreciate that, Your Honor.
THE COURT: And there's three more seats

there for other lawyers who want to use them. We will try not to influence the jury.
I'm going to get my water here because my throat is a little dry here.
MR. SMITH: Good morning.
My name is Russ Smith. His Honor Judge Dowd is --
THE COURT: I prefer you use the podium.
MR. SMITH: Your Honor, if we -- do we have to be behind it or can we just be closer to it?
THE COURT: Move closer to it, but I told counsel I want them to stay by the podium.
I'll say to the jury, what I have to worry about, the lawyers are in your lap, and I try to avoid that.
MR. SMITH: Is this okay, Your Honor?
THE COURT: I want you behind the podium.
MR. SMITH: Good morning.
Let's start all over again.
Is this okay, Your Honor?
THE COURT: That's fine.

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MR. SMITH: You want us to stay behind it all the time? If you tell me those are the rules, I'll do it.

THE COURT: If you have to get up here to use this, but generally that's the rules, stay with the podium,

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when you are questioning the witness and addressing the jury.

MR. SMITH: I'll do it, Your Honor. If I misstep, I'll hear it.

If we were going to try to capture this case in just a few words, there are a variety of words we could pick. We might -- this might fit it. The concept of profit over people, choosing profits over people, refusing to warn, and killing David Tompkin.

And those are some fairly harsh words. And maybe I should start out by sugar coating it, but I'm not, because I won't be sugar coating it at the end, and I'd be a phony to stand here and sugar coat it to you now.

So I'll put it in black and white.

THE COURT: Counselor, this is really opening statement, not final argument. I'm not going to permit the defendants to engage in final argument, nor you.

This is an opening statement where you explain your case to the jury. It's not final argument.

MR. SMITH: Okay. We expect the evidence to show what I've just said. We expect the evidence to show profits over people, refusal to warn, and the killing of David Tompkin.

Now, why do I say that? To do that, the evidence is going to take us all back in time. It's going

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to take us back to a time that none of us in this room even remember at the beginning of this time. And it's going to take us back to science.

And let's start back and see what we can see.

The evidence is going to be that as far back as 1923, in Germany -- can I stand here while I use this?

THE COURT: I guess you will have to --

MR. SMITH: Your Honor, I don't want you to --

THE COURT: I don't know how you can handle those and stay at the podium.

Why don't you take the microphone?

THE CLERK: (Handing).

MR. SMITH: As far back as 1923 in Germany, there was a scientist by the name of Fahr. He's not a scientist, strike that, he's a medical doctor. He writes a letter to a medical journal, I believe it was the "Lancet," but he writes this letter in 1923, that almost all the patients that he sees who have lung cancer were smokers.

I want to jump us to 1928 for a minute. I want to go to there is a case study in the United States in Massachusetts by two gentlemen by the name of Lombard and Doering. They say that there's a statistical significance regarding smoking and buccal cavity cancers.

Now, the buccal cavity is a word I had to

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look up in the dictionary, so but it's in the cheek. And this was a study that was done by the Massachusetts Department of Health, and Harvard School of Public Health in combination. This was a fairly reputable organization or combination of organizations. And this is in the year 1928 in the United States.

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Now, in 1927, in Great Britain, we have Tylecote indicating that his patients that he's seeing, in his letter to the medical journal, were, as far as he could tell, they have lung cancer, they were smokers.

In 1929, in Germany, there's a gentleman by the name of Lichint who does a survey of the current medical literature, and I want to stop before we got here. Why is this -- this evidence will come in, one of the things there will be evidence as to the issue of what was available to scientists and what was available to people who would be making tobacco products.

For instance, if somebody is making automobiles, there's science out there regarding tipovers that's available to them, and that's what this -- this stuff is out there in the public domain and it's known or considered known by the people in those fields.

So he does this particular paper, and this is 1930. And we are going to be talking, there will be evidence regarding -- in fact, it's 1929. Forgive me.

That is five years before David Tompkin is born.

He goes back, this, in 1929, he says prior to that time, there were -- the ones that he lists, there were nine other investigators besides himself that believed that cigarette smoke is partly responsible for the increased incidence of cancer of the bronchi and lungs. And there will be evidence on the bronchi -- and most of you know this -- but they are just the tubes that go down into your lung and they get smaller and smaller tubes out there, they bring the air in and out.

And this is in 1929, he talks about two other things, and you are going to be hearing about this as the case goes on. There will be studies wherein they paint tar on laboratory animals, mice or rabbits, to see what happens. And they are using tobacco tar to do it.

Now, this is -- and in 1929, he indicates this: They were causing epithelial proliferations, not a true cancer in those studies, but epithelial proliferations.

There is another word you are going to hear and it will be defined as the "epithelium" is like we have skin on our arms, it's just the skin on our organs. And they are looking for changes when things like that occur, and they found changes, but they didn't find any true

cancers at that point in the studies they had done.

But they were looking at it as far back as 1929.

Now, they did do something there that I think is very intriguing. In his paper he refers to a gentleman by the name, assuming I spell it accurately, it sounds like he's either from Italy or from Japan, his last name is Okamoto. Here's the study that is covered in this summary of the German medical literature at that time, and this is printed in -- no, strike that. That's another one in the German medical literature that appeared in America.

In '29 it was in Germany.

But this gentleman named Okamoto, he did this: He took laboratory animals and he painted tar on them. He took what they'll call control groups. You know, if you are going to see if a medicine works, you may give it to ten patients, not give it to another ten, see what

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happens and you can start making predictions. We all are aware of that.

What he did there was he painted tar on the backs of certain laboratory animals. On others he didn't. He then did something that sounds kind of cruel -- but laboratory experiments are cruel, let's face it -- he burned another portion of all the animals.

The intriguing part of that is the evidence

will show that of the ones who he hadn't painted tar on another part of their body, only one-fifth of those burns after they healed turned to cancer.

But those laboratory animals that had this tar, tobacco tar, painted on another part of their body, had cancers in one-half of those scars. That's two and a half times as many of the ratio on the others.

And if, you know, if you had a baseball player that hit an average was two and a half times as high as another ball player's average, you would think there was something to look at. There might be a difference. And that's clear back in 1929.

And he discusses the -- in that survey, they discuss Fahr as well.

Let's go to the United States. JAMA, it's an acronym, shortening of Journal of American Medical Association, in 1930, they do the analysis of a lot of what Lichint did but in English. It's an advantage to English-speaking people to have it in English. And they did an analysis of the German medical literature in JAMA in 1930, United States American Medical Association.

So there were a lot of people concerned about this and trying to figure out the answer. And this evidence will come in on the question of whether or not there's a duty to warn, if there's information out there

with respect to having a knowledge of a danger.

And that danger being -- that danger being that smoking cigarettes causes lung cancer, when the knowledge comes out and if it's known by the scientific community, the question is should a manufacturer warn.

Now, let's go to 1932. In 1932, in the United States, there's a gentleman named McNally, and I recognize to a certain extent this is tedious, but to another extent this is evidence that I think the evidence will be. This is in the area of the heart of the case. It's one of those items in the area of the heart.

They indicate that the death rate in England from cancer of the lungs, pulmonary cancer, lung cancer, more than doubled from 1910 to 1927.

Now, specifically it went from one in a hundred thousand to 2.3 in a hundred thousand. This is 1932, a study.

And the authors -- or McNally says the increase in cigarette smoking causes you to believe it's one of the factors in the cause of it. This is printed in the United States of America, this McNally.

Now, you know, there will be evidence about tobacco. Tobacco is not a brand new object. It's just something that's been here a long time. Cigarettes are a brand new object when we go back to this point in time. I

think they are invented in around the 1880s or thereabouts. They start becoming mass-produced about 1900.

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There will be evidence and testimony regarding latency period. Some things don't bite you right off the bat. If you get bit by a dog, you know when it happened to you. If you get bit by a toxin, it has to do its thing, and after it's done its thing, then you know you were bitten.

So when you start to think, you see the timing, there will be evidence as to the timing, the latency, and McNally says in 1932 in the United States telling the world, the scientific world, the world that includes people making cigarettes, that he thinks smoking is one of the factors.

He also talks about the fact in this paper that people shouldn't smoke cigarettes too short, because in the last two inches is where most of the tar is located. Because the more you draw it down, you have to be careful about smoking them that way.

The evidence will be at no time, at no time did the cigarette industry ever put out even that statement to their smokers, saying "We think you ought to at least consider not smoking them so short." They said nothing, let alone warn of the danger or the possibility, even, that smoking cigarettes could cause lung cancer.

In this study, he cites to -- he cites to Hoffman and others about it more than doubling. I mean, scientists all over are coming up with this conclusion.

And again, he talks about painting cigarette tar on animals and getting these changes.

There's a lot of scientists in the country, in the world, that are tracking a couple of things. They are tracking the statistics, epidemiology, concept of -- I think it started out in trying to find out what causes epidemics.

I think some people went to a well, they were drinking water, and it was determined that in this town this disease was affecting people and they couldn't figure out why. But after awhile, they found out it was the well.

And when they shut up the well, when they capped it or they quit drinking out of it, lo and behold the disease went away. So it's been around a long time and it's pretty much looking at cause and effect. We do it everyday in our life.

But again he's talking further about the tar studies on animals, and he was getting these epithelial changes, the cellular animal tissue cover.

Let's now stay in the United States. We will go to the year 1933. Cancer of the bronchus is stated at that time as a problem of major importance.

Now, there was a gentleman by the name of Graham and Singer. Now, Graham and Singer, they are kind of a new entry into this as far as where they come from. They are surgeons. The surgeons are concerned about this, the evidence will be. They are trying to figure out, you know, people are dying. Lung cancer is -- and they haven't figured out what to do with it because it's pretty much a new kid on the block; a deadly kid, but a new kid.

So these gentlemen come up with the concept instead of taking out one of the lobes or trying various other treatments, they are going to take out a whole lung, so that's what they are doing. But in the process of doing that, they indicate that at that time lung cancer had risen

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to account for five to ten percent of all cancers.

This is in this paper in 1933. I mean, it goes from a place where people, if they find a lung cancer, they call in everybody to watch the autopsy so they will see one in their lifetime in the early 1900s, to by 1930, five to 10% of all lung cancers caused by -- I mean lung cancers are five to 10% of all cancers.

We now go to 1938, Raymond Pearl, tobacco smoking and longevity.

Now, incidentally, and his study concludes that smoking of tobacco was statistically associated with an impairment of life duration. He does it and he grasps

it, and it shows the distinctions between moderate smokers, heavy smokers, nonsmokers. Both heavy and moderate smokers' life expectancy is decreased because they determine when they die, and he writes about it.

And he studies a statistical study of 6,813 men. They were using men then because the cigarettes haven't been sold to the women at that point in time. Primarily, or at least most of the smokers were men, or had been in the earlier years.

Now, David Tompkin is now with us. He's with us then, 1938. He's born in 1934. He's born after Graham told us about what had happened, but he's born four years before Pearl's study.

So he's out there. The early warnings, zero. Are there any instructions even saying to somebody "Say, when you smoke it, remember, you have -- at least smoke it down -- don't smoke it too short because you might have trouble," let alone saying to him "Hey, the studies, the statistical studies, the tar studies are causing us to think our product might cause lung cancer"? There is none of that on anything. We are in 1938.

Now, let's go to 1939, the next year. These are two doctors in New Orleans, and they conclude in a book, Primary Pulmonary Malignancy is the topic they write, and this is the treatment by the total pneumonectomy,

cutting out the entire lung.

They are surgeons, and they put in their paper they thought that smoking is a responsible factor in the increase in lung cancer. This is in 1939. David Tompkin is five years old.

An expert witness you will hear from shortly, by the name of Dr. David Alan Blum, will tell you in his opinion that's when warnings should have started. That up to 19 -- by that time, 1939, all the stuff that had come out before and that coupled should have told a reasonable manufacturer, trying to use good care for their customers, to start warning about the potential danger of smoking and lung cancer.

They refer clear back again to Fahr, 1923, to Lichint, Tylecote and McNally and others to support their particular own beliefs and findings.

They say this, quote, "It is our definite conviction that the incidence of pulmonary carcinoma is due largely to the increase in smoking." They go on to say "Every one of our patients, with the exception of two women, were excessive smokers."

They also go on to say it usually occurs in people over 50, which again generally will build in a latency factor. Now, that's in 1939.

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They then go in 1941, they issue another

paper, Ochsner and DeBakey, surgeons, they say there is a significant relationship between the increased incidence of carcinoma of the lung and the increased production of tobacco.

They make this statement in their paper: "Lung cancer rises from almost complete obscurity in 1912 to one of the most -- foremost subjects of the day in the 1930s." Again, that's what the evidence will be, that it rose from almost complete obscurity in 1912 to one of the foremost subjects of the day in the 1930s. And they go on to say they believe it's caused as reflected by the increased production of tobacco.

Let's jump up to 1950. This is the year -- all of this stuff has happened before David Tompkin ever smoked a cigarette. The evidence will be that in 1950, in the Journal of the American Medical Association, this is the report. It's an article, it's called "Tobacco smoking," it's lead-out is "A possible immunologic factor in bronchogenic carcinoma." It's written by Wynder and Graham. And they make this statement, which I think is very -- this is their conclusion expressed in this opinion.

You know, you can talk about it on a lot of things. The more hours of sleep you go without, the tireder you get. The more mileage you drive, the closer you get to the place you are going. I mean, a reflection

of numbers and time or distance.

They say this: "The risk of developing lung cancer increases in direct proportion to the amount of smoking."

That's a pretty scientifically compelling concept, I submit to you. But they don't say -- I mean, they go beyond the level of saying "We think that cigarette smoking is causing the lung cancer increase; not only increase, the appearance of it practically." There is evidence in some part of the world there was radiation or some type of a system could cause lung cancer, but that was even in a different country.

But when you add that on to the fact that as you go from ground zero to the ceiling, if you were to -- that the higher you go, the greater the probabilities are for coming down with lung cancer, seems to me that it's sure worth considering.

They base their study upon 684 cases of proven bronchogenic cancer. These tubes that are going to the lung. And then after they tabulated their data and they were still writing the report, they had 45 additional interviews that showed the same trend. Their statistics, they are what they are. You can determine whether you consider them -- you will determine whether you consider them compelling at some point in time.

But these are their statistics. Of these 684 cases, 94% of male patients with lung cancer were cigarette smokers. They had 4% were pipe smokers and 3.5% were cigar smokers. And here's, they put, this is in their report -- and I think again it's worth considering, their paper -- they believe this is because cigarette smokers inhale more than pipe smokers or cigar smokers would.

This is 1950. Do any warnings come out? Any instructions, anything come out of these four tobacco

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defendants? Nothing. And this is the year David Tompkin, 16 years old, Cuyahoga Falls, Ohio, high school student, has his first cigarette.

In 1950, there's a study done by -- in Great Britain by Sir Richard Doll and Dr. Hill, and again they interview -- in their study they interview 649 men and 60 women of carcinoma of the lung. They state as follows: "It is concluded that smoking is an important factor in the cause of carcinoma of the lung."

And they go on to study all the physicians that they can study in Great Britain. You see, the physicians, they were also -- they were heavily -- heavy smokers. It wasn't just a high school kid here in Summit County, Ohio. It was physicians. Not only -- they didn't just start smoking, they were still smoking. And Doll and Hill do these studies of cigarette smoking among doctors

and what happens to them. And it's the same thing as everybody else has found out.

Are there any warnings? No.

It goes on, Wynder and Graham in 1953. David Tompkin is now 19 years old, he's been smoking for three years. Evidence is he's just smoking a few cigarettes a day at that time. It won't be precise, but ballpark area, four to six cigarettes a day. He's still not a big-time smoker.

But in 1953, they cite to the article of Wynder and Graham and Doll and Hill, these other supporting articles. And Wynder and Graham, it's Wynder and Graham citing back to their own article, in effect -- but Doll and Hill are from Great Britain -- that the risk of developing lung cancer again increases in direct proportion to the amount of smoking.

They then -- and in this paper they cite ten other recent studies that reach the same conclusion. I mean, it's coming up all over. It's not just a few people hiding in a closet. It's being published and it's just happening everywhere.

They indicate that tobacco is thought to play a role in production of also -- also thought to play a role in production of cancer of the larynx, oral cavity and esophagus. But there are no warnings issued about

anything, any kind of dangers by any of these four defendants, or any other tobacco companies for that matter.

Now, having come to that point, Wynder and Graham wanted to do a tar study. We've talked about the tar studies. They decided to do one.

They painted the backs of mice, and they discuss in this report in detail their thoughts about what had happened with other studies. When they paint the backs of the mice, in this '53 study, they conclude relevant tobacco tars were carcinogenic when applied regularly for a long time to the skin of laboratory animals.

And their statistics were they tarred 81 mice. Of those 81 mice they tarred, 59% developed papillomas, and of the 81 tarred mice, 44% developed histologically -- they can scientifically test it, proved carcinomas, cancer.

Now, that comes out in 1953.

There is a coincidental event I'd like to mention to you that will be coming out. In 1953, the American Tobacco Company in that fall was also doing

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studies. And they did studies through utilization of someone they continued to work with, University of Virginia, and I also mispronounce this but I want to say Ecusta, but I'm not exactly right, but it's a paper company down there.

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And what they did was the University of Virginia would conduct, apply the tar to those laboratory animals, they would get slides. They sent the slides to this paper company scientists that were there. They were to do the studies and the reading of them.

They come back with that there's been some changes in these mice. And everybody copies everybody, this correspondence. There is a three-way, American Tobacco, University of Virginia, this paper company. The University of Virginia writes back to them and says "Well, you know, some of the mice were damaged." They write, I believe the date is I want to say November 17th, 1953.

But this much I do remember from the articles, and three days later, November 20th, that fast, this paper company shoots a letter back to them with a copy to American Tobacco and they say "These are all leading to cancer." Because they wanted to document that, and you'll get to see the actual article, the actual correspondence.

Now, that's November 20th. Twenty-one days later, December 10th, the American Tobacco Company sends a telegram to the other tobacco companies saying "Hey, you know, we've got this Wynder and Graham, we've got this Wynder tar study out there."

At this point in time, finally, some of the press is starting to print something. "Reader's Digest"

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runs an article. American Tobacco Company's salesmen are nervous. President of American Tobacco sends this telegram out saying "Those of you that want to get together, we ought to get together."

And at that time, eight or nine of them do get together. It includes all the defendants in this case except Liggett does not go. It includes people that grow tobacco, a couple of them. The big players, big leaders of these companies show up. They respond to this telegram by meeting four days later in New York City, December 14th, and they have a meeting as to what they are going to do.

And at this stage of the proceeding I'm not able to go any further than that on that question. So but I am saying to you, up to that point in time, it's very intriguing, the evidence is, will be, I believe after all of this backdrop, all of it.

We come into '53, Wynder publishes their study on tars. American Tobacco, by coincidence, has their own information. Are any warnings issued? No.

There will be evidence, there's evidence, no evidence of -- in fact, David Tompkin smokes until 1965 when he quits. Are there any warnings ever? No. Are there any instructions? No. Anything said that would alert their people? No.

Surgeon General's report comes out in

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January, '64. The government puts a warning on in '66. But no warnings.

In 1965, testimony will be Dave Tompkin is working on a -- this might, I don't know if this would stand heat. The evidence will be Jocelyn's husband David,

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you'll hear about David, but this is what David walked into. He grew up in Cuyahoga Falls, he came from a family of bricklayers. They go -- his great grandfather, I believe, was a bricklayer. It's an interesting story actually.

And he was a bricklayer. His dad, in fact, I think it was his dad -- could have been his granddad -- but I think did the brick work -- maybe it was his granddad -- did the brick work at Stan Hewitt. And Dave Tompkin, during this stretch when they fix up the brick work, he goes in to do that, he was hired to do that. He was a quality, quality brick person.

But in 1965, it could have been on that job but I can't -- the evidence will be what it is, but it's on a job, he notices he thinks that he's feeling some shortness of breath. Now, he never was aware that cigarettes would cause you any great harm. You'll hear his testimony. You can evaluate it.

He did, over time, the one thing he did over time was he followed the trend. Started out in 1950 with

Old Golds. I think his brother smoked Old Gold. He started out with Old Golds, smoked them for about a year, '50 to '51. And then in '51 to '54, which is right when Wynder does his studies, he's smoking Philip Morris. Then he goes to Pall Mall or Pall Mall. I never have known for sure how to pronounce it, but I usually say Pall Mall.

'54 to '57, and to '59, he smokes Chesterfield. And remember, the longer -- well, I can't say you remember. There will be evidence longer cigarettes came out. Pall Mall was a longer cigarette, and the longer the cigarette, there's the further you are from the fire.

Smokes Chesterfield from '57 to '59. Then he gets into filters, and it will be his testimony he thought they were better for you. And you'll see ads for them, Herbert Tareyton, Kent, Lark.

And he starts out smoking four or five cigarettes a day. By the end, he's smoking two to two and a half packs a day, the last five years he smokes; or thereabouts. I don't -- the last few years he smokes. You'll hear his testimony. And sometimes three. But he quit.

He noticed it was right after the Surgeon General's report, and there's going to be no testimony from him that he remembers it, but I am saying to you it was in the air. But no matter how you slice it, he noticed

shortness of breath. He quit.

He and Jocelyn went to the same high school, there will be testimony, Falls High. I think he graduated two years earlier than Jocelyn.

They met each other, liked each other, got married. You'll hear the testimony about they raised three daughters. You'll see some of the work. He liked to work with his hands. He was -- very talented people, actually.

He, at nights and stuff like that, he would -- he liked to build furniture, and we will see some of that, some of the things he built for the family. They had a little stuff he did around the house. He was just -- he was a handyman. He wasn't like some of us that have been born maybe with ten thumbs. He had real skill there.

But and you'll hear the testimony of, you

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know, the loss that -- some of the times they had together and things of -- I want to save that. You'll hear that from the family members.

The defendants' evidence, it appears, will be that everybody knew smoking was bad for you, clear back to the beginning of time. I think there will be -- I don't know, but one of the kings somewhere, and everybody knew smoking was bad for you. And if you smoked, if you chose to smoke, too bad, shame on you, you lose, we win. We sell

you our product and you lose.

And that's -- now, I'm not -- the evidence isn't going to be that there wasn't information in the public that there weren't -- that smoking didn't have any harms.

I think the evidence will be that in 1950 or in the fifties, at least half the men in this country smoked. You'll see the ads. Most of you have never seen them. But you'll see some of the ads that occurred back then.

But smoking was part of life, it was part of the American way. Smoking was given by the tobacco companies to the soldiers for free, and when they came back home and they kept right on smoking. I mean, smoking was part of the America. And you'll see Humphrey Bogart smoked, John Wayne smoked. Smoking was -- that was a good thing to do. You get the girl, have a lot of fun, be one of the guys, be tough. Put them in your T-shirt and roll. Whatever you wanted to do, it was part of being a guy. It was like going fishing.

There, the evidence is going to be, we submit to you, that there was great confusion and doubt in this country as to whether or not smoking caused lung cancer. And that is the issue.

The issue isn't whether or not if you got

that smoking might lead to shortness of breath, which when Dave Tompkin noticed he was short of breath, he quit. I mean, it isn't whether or not it might give you bad breath or that it was morally corrupt or it will burn holes in the tablecloth, or that you weren't a nice person if you smoked, you weren't a good woman if you smoked; it was bad and you could be labeled a hood, if you were a guy, by some people.

But at least half the guys were smoking. But the question is: Was there common knowledge that smoking cigarettes would cause lung cancer for real. I don't mean some type of a -- the specific linkage, the specific link. His Honor Judge Dowd will tell you the precise law, but that's -- and there's going to be a difference on that.

And it will be -- this will be in the ballpark and the evidence will diverge on this issue. This is what we submit to you the evidence will show; that there was no common knowledge that smoking caused lung cancer. And by common knowledge -- this should be in there because it's of the specific link.

Evidence will be the issues will be drawn. It isn't whether or not you ever heard of it, whether they ever heard of it from anyone, but whether or not it was believed. His Honor Judge Dowd will charge you on what the word "Knowing" will mean.

Now, there's going to be another issue in

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this case where the lines will go pretty significantly apart. In fact, they will go 180 degrees apart.

And that's this: There will be testimony that there was tissue taken after the treatments that occurred. There will be an autopsy, you'll have the doctor, Dr. Tomashefski did the autopsy. There was tissue that was burned, and they burn the tissue, they can see what minerals, what metals, minerals are left. And asbestos bodies were present.

Now, asbestos is a factor in causing lung cancer, as insofar as -- and you'll hear the testimony on it. It can be. It's not required, but if, for whatever reason -- and one of the papers will talk about that -- but if somebody is exposed to asbestos and is a smoker, there is what they call a synergistic relationship.

And I don't know about you, but I never knew what this word meant until I heard of cases of this type. Synergy. You know, if -- see, if I had a coin -- do you have any coins, Bryan? Okay. I've got a quarter and a one dollar bill. Now I have a five dollar bill. I don't want a five.

Since I started out on this, I'm too stubborn to back up.

MR. COFER: Do you need one from us?

MR. SMITH: Let's do it this way.

I appreciate the offer. I have this laid out in my head, okay.

MR. COFER: If you change your mind.

MR. SMITH: I will put this pile -- over here I have three dollars and over here I have $20, okay? $23.

Now, there's a variety of things that could happen. If you pretend those items, if they can be added together, which is still bad enough, would mean the chances of your getting lung cancer, say one of them was 20 and one was 3, would be 23. But that's additive.

For some reason -- and some of you know this from your medical training and other training -- but some things multiply, synergy. So if you are exposed to both asbestos and tobacco, it's 60. It isn't 23. It's multiplied. So it's big trouble.

And we had the tests done. We are not running from it. Our testimony will be that, yes, was the asbestos a factor? You are doggone right it was. Was tobacco a factor? Yes, it was. They both caused his lung cancer. They are both causative agents.

And the law does provide if you have a wreck at the intersection, three cars collide and two are at fault, they are both responsible. If you are exposed to two toxins and they both cause an event, they are both

causative factors under the law. You can see the can of worms you would have if the law were different.

So the testimony will be from -- it will be from our end that tobacco and asbestos caused Dave's lung cancer.

And theirs will be that it's just the asbestos exposure; that's the only toxin that played a role.

Now, there will be testimony here as to causation. And that's right where we are with that period.

You see, he quit smoking in '65. He didn't know he was bit until 1992. That's when he's diagnosed

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with lung cancer. 27 years of a latency.
The fight over the latency period, they are going to say "He's -- we don't care what -- what the situation winds up, it's somebody else's problem; it's not ours; it's too late."
Something happened. Maybe it was serendipity, grace, whatever. There is a gentleman and some other doctors, but his name is one I want to refer to as Dr. Sidransky from Johns Hopkins. He and --
THE COURT: If you are going to start on that subject now, I think it will be a good place to take a break. We have been at it an hour. And the jurors can take a break.

We will take about a ten-minute break. You may file out.
(Jury out).
(Recess taken)

THE COURT: Let the record show the jury is not yet back in the courtroom.
The juror, Lydia Gordon, was obviously ill. We took the recess, we took her down to the dispensary. And there was some concern at the dispensary what she's got may become difficult in the sense of maybe contaminating other jurors. So reluctantly, I have excused her, so we are down to a jury of 9.
(The jury was returned to the courtroom and the following proceedings were conducted in open court.)
THE COURT: Please be seated.
You may continue.
MR. SMITH: Yes, sir. We were talking about Dr. Sidransky.
Dr. Sidransky and other doctors had been doing studies in this area. He's not the first in this area that I'm going to talk about, is one that Dr. Sidransky will explain to you.
They look at molecular changes going clear back to the -- getting to the core of the genes, the actual changes that occur.

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As you are aware, when you get cancers things happen in your genetic system. What they did, they

looked at the changes. The word will be a loss of heterozygosity. And I'm not going to put you through that right now, because I'm not good enough to do it; he is. And I'm going to leave that totally to him.

But I know this much about it. If -- I guess the best one I can use, analogy, I've heard a lot of judges use over time. If you go to bed at night and the grass is green and you wake up in the morning and it's white, you have circumstantial evidence that it snowed last night.

What they have done, they mark these particular genes, it's becoming quite a science, and they look for specific numbers. They number these. And they will be in pairs, and they will look for events that occur to them, and they will track it back to seeing it the same way, in a sense, the same mental, the same mental concept that they were doing when they would say, well, some people don't smoke, some people do smoke.

Lung cancer, this one, 94 percent from cigarettes, the one study of the lung cancers. And that's how but they would compare.

They look, what they, did they took people they knew had lung cancer, and they studied the changes in these genes. They compared what numbers

were affected with respect to those that smoked. There were, I want to say, 40, but whatever the number is, the ones that these known smokers had, hit specific markers.

What has happened here is, they have taken slides from Dave Tompkin, they have analyzed, they studied these slides and they match the change that you would get from a smoker. And Dr. Sidransky will indicate to you, I think the number you will have will be in the high 90 percentile range as far as causation.

I think the testimony will be fairly compelling, but you are going to -- you'll have to assess that, you'll have to assess him, the study and his conclusions. But it is -- it was, because they want to ride the issue of the 27 area, year area. Even though Dr. Tomashefski, the guy who did the autopsy, it was his opinion before any of these tests were run it was related to lung cancer. But this is sort of -- this is a nice anchor, as far as I'm concerned, on behalf of the Tompkin family.

I'm tempted -- these medical articles are also important and I'm tempted to put them up here and start running them through and you will have a chance to see them.

I would just like you to remember to take a look at some of these, because I think they are very compelling articles. I would like to take us, maybe take a minute, can we show that video that we have, please, Ray.

I would like to -- this will be a piece of evidence taking us back in time to what was being seen on television back in the 40s and the 50s and maybe

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into the '60's. I always like to have somebody else have the technical difficulty rather than me.

(Video played.)

MR. SMITH: That's what public -- the evidence will be the public was seeing, they were seeing smoke. They weren't saying even be cautious. They weren't saying -- there were no warnings. And the interesting dichotomy that will come out of that, let's touch on this before we get to that piece of.

I submit the evidence will show that smoking cigarettes between the years 1950 and 1965 were more dangerous than the ordinary consumer would expect.

That's what we submit the evidence will show. His honor Judge Dowd will charge you on all the details of that. And they are obviously going to oppose that they are going to say everybody knew cigarettes caused lung cancer, or at least the

ordinary consumer knew.

And that leads the evidence will come down to a very interesting dichotomy, crossroads, they are going to have to take the position, the evidence will have to be this: He knew, and they didn't.

We are going to have a person who makes their living dealing with polls. His name is Dr. Tom Smith. He's from Chicago. And what he does, they go back and look at old polls for the United States Government to bring them up to show what they show. And you will hear him testify as to what the polls show the American public knew regarding the connection between lung cancer and smoking.

And we submit to you it's going to establish, even on the scientific polling basis, Gallup Polls, might be some Harris, whatever they were you will see them, that the ordinary consumer didn't know that smoking caused lung cancer.

And, in addition, the public in general didn't know that. That doesn't mean they weren't any people in the public. In fact, it's pretty clear we can almost stipulate there were some people in the public that knew; there were the tobacco companies, it was the scientist -- where is the board? I put it on top.

These scientists, going clear back to all this point in time, were putting it out. Sure, did they know? Yes, they knew. Did the cigarette companies know? Whose in box did that information go to? Would Dave Tompkin -- would his research department be getting scientific articles?

And what did they do with it? That's an example of what they did with it. Telling you everybody smokes it will make you popular, it will get you the girl, not bothering to tell you that it would kill you, give you lung cancer or that it even might, or that you even better be careful. You know, don't smoke them down too deep or if you smoke too many cigarettes the more you smoke the worse it gets.

And the reason they didn't do that, we submit to you, I always use delta for defendant. It's one of the -- that will be the defendant's position.

And we submit to you that the evidence will show the truth is they knew, he didn't.

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The -- forgive me for a minute but I'm going to go -- I want to touch base again on something that is a little tedious, but we are all here to work. I want to show you, I actually do want to take the time, this tedium, but might as well do it now rather than have to do it all at the end.

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Let's look at a few of these articles.

Here is an article I mention to you from the Lancet, this is 1927, and I just highlighted the section I wanted to call to your attention. But I think it is in almost every case I have seen and known of, the patient has been a regular smoker generally -- good for you Brian -- of cigarettes. Thank you, sir.

And this here is one, this has to do, I mention to you the cancer of the cheek, the cancer of the cheek, this was that article from, what was this year? It's Lombard and Doering. And I think it is 1929 or 30. If we've a chart there it will say exactly Lombard & Doering, 1928, United States. And this was actually -- this was pipe smoking. Heavy smoking is more common in the cancer group than among the controls. In our sample heavy smoking was largely pipe smoking and was particularly more common in those individuals with cancer of the buccal cavity.

This is also, this is 1930, this is that Lichint articles. And here is the article that I mentioned where there is three things referred to. This is again in 1930. The great increase in smoking with it's intendant inhalation insofar as the author of this article Lichint, 4,559 cases of cancer of the bronchi and lungs reported in the literature as to the

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increasing frequency of cancer in these organs.

Put that up and they can see it, please.

He talks again about the fact -- and it's significant because most of them that are getting it are men. 3,370 are men 689 are women; ratio of 5 to 1. That's at a time when it's men smoking cigarettes not woman. Can be explained in part by the great increase in cigarette smoking with it's intendant inhalation.

We then go to McNally. And McNally is 1932, USA. In his paper, under the conclusion section. Leukoplakia in heavy smokers and the recorded increase of cancer of the lung.

And he came out with the cigarettes should not be smoked too short, as the last 2 centimeters retain most of the tar and other products of incomplete combustion.

This was the one I mentioned Graham and Singer. These are from St. Louis, the surgeons. They removed the full lung.

And again now, for our time period we are at, it just has Graham on there, but it's Graham and Singer 1933. Dave Tompkin is born one year after this.

Carcinoma of the bronchus in recent years has

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become a problem of major importance. It is now known that carcinoma of the lung, which almost always arises in a bronchus, constitutes between 5 and 10 percent of all carcinomas.

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And incidentally, they may be discussed later, but that was at a time when cigarettes did not have filters. And that will be discussed as the case goes on.

Let's just put this graph up. I think this is the cleanest way to show this. This is the article I mentioned, the tobacco smoking and longevity, it's right up here, Pearl USA 1938.

Maybe we could put this graph up please, by --

See that graph? This would be the -- this here is the line for the age in years, 30, 40, 50, 60, 70, 80, 90, 100. And this is the thousands of survivors, how many people are surviving. So they can find out how many people are living to certain ages. And when you look, this solid line here is heavy smokers, and there is a dotted line for moderate, and then nonsmokers up here.

This is the one that struck me as being significant, because of it deals with quantities. But, for instance, at age 50, the heavy smokers, you

have -- what is that 60, 60 percent survivors. Nonsmokers, 80 percent of them.

If you measure in thousands out of a hundred thousand are surviving.

The moderate is less but not as significant as the heavy, but both of them are down. And this graph is all the way down to -- you get to the end where people who are a hundred -- almost everybody, all of us like to go over a hundred, most of us aren't going to make it probably. But it strikes me that, that's pretty compelling.

But at any rate, that's his graph and that would have went in the in box of the tobacco companies, not in the in box of Dave Tompkin. No warnings.

Now I mentioned to you Oschner and DeBakey. Then they collected 79 cases. And I'll get you their conclusions, so I don't make this too laborious.

In fact, can I take that back?

You see over this time it rises from being almost uncommon. I didn't mention this, but the papers will show that it rises to number 2. By 1950 the only cancer that's greater is stomach cancer. But here this is they are alluding to that here. Until recently carcinoma of the lung has been considered a

relatively infrequent condition. However, recent studies demonstrate that pulmonary malignancy is not only a common occurrence but is one of the most frequent carcinomas of the body.

In fact, we can -- down, can you go down that side a little more for me please, Brian? Right there, sir.

This increase in incidences of bronchogenic malignancy is undoubtedly apparent and real, both as evidence by autopsy studies from the German Clinic -- I don't know, Jung Hanns, but 1.67 percent of all autopsies performed from 1893 to 1927. The incidence of primary pulmonary carcinoma in all malignancies found at autopsy was 14.27 percent during that period. Seyfarth found increases in the incidence of pulmonary

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carcinoma from 5.01 percent during 1900 to 1906 to 8.75 percent from 1919 to 1923, during the first half of 1924 was their an incidence of 15.5 percent -- then he goes down -- percent of all carcinomas. And that pulmonary carcinoma was second in frequency only to carcinoma of the stomach and of the intestine. And in later reports it puts it in front of the intestine.

In our opinion, the increase in smoking with the universal custom of inhaling is probably a responsible factor, as the inhaled smoke, constantly

repeated over a long period of time, undoubtedly is a source of chronic irritation to the bronchial mucosa. In addition to the increase in pulmonary malignancy.

They will point two to three factors. The fact of irritation going through your lung causing irritation; the fact of the heat some of them do; and the tar. But the tar seems to be the one that runs like a thread when you see -- when you look at most of the studies.

MR. COFER: Excuse me, counsel. What year is that study?

MR. SMITH: That study is, give me one second, please.

MR. COFER: Was that 1939?

MR. SMITH: It's 1939.

MR. COFER: Thank you.

MR. SMITH: Yes, sir.

I would like to color all of this paragraph but I won't. This is 1941 Ochsner & DeBakey from New Orleans.

Until relatively recently carcinoma of the lung was considered infrequent.

Adler collected 374 cases of carcinoma of the lung in 1912 and stated: On one point, however, there is nearly complete consensus of opinion and that is

that primary malignant neoplasms of the lung are among the rarest forms of disease.

Can you yellow that next couple, just if you wouldn't mind. Just block it out in-between there, if you would, sir.

Whereas, this opinion may have been justified in 1912, statistical facts indicate an antithetic point of view today. Carcinoma of the lung at present is -- and we are in 1941 -- is second in incidence to carcinoma of the stomach, as is evidenced by the reports of Brines and Kenning and -- I can't read that name -- Koletsky. In both of these reports the conclusions were based on autopsy series and are, therefore, absolute and not relative.

Brines and Kenning found that among 936 patients admitted to the tumor clinic carcinoma of the lung was fourth, being preceded by carcinoma of the stomach, of the uterine cervix and of the breast. These, however, were clinical series and were less accurate than the autopsy series. Koletsky observed that the lung ranked second only to the stomach as the primary site of carcinoma in 7,685 consecutive cases studied post-mortem. Kikuth similarly found that of the sites affected by carcinoma, the lung was second.

Again, they found that it has been long

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recognized that pulmonary carcinoma occurs principally in the male sex, which again would be evidence consistent with smoking cigarettes in that time period.

They also talk in here about Roffo doing these tar studies. Again it's referred to and they talk about Hoffman. And then over here on page 221, oh forgive me, I put orange on there and that's, orange is bad for copying. One thing I learned in life it's that. This is -- this has some intrigue to it if you can put that up.

And again now we are in 1941. And what I messed up with the orange in there.

It is our definite conviction that the increase in the incidence of pulmonary carcinoma is due largely to the increase in smoking, particularly cigarette smoking, which is universally associated with inhalation. Every one of our patients, with the exception of two women, was an excessive smoker.

And I could go on, but I'm not going to do that to you. But there is no way for any of us to do our job in this case if we don't take time to look at the literature.

We submit the evidence will show that they refused to warn. And all of this resulted in a harsh

word, as it is as harsh a word as it is the killing of David Tompkin. That was what was the end result.

And we submit to you that that, in its total is what the evidence is going to show. We believe the evidence will very, very well support a verdict in favor of David Tompkin in this case.

I'll get a chance to talk to you again at the conclusion of the case. And look forward to bringing our witnesses, thank you.

MR. COFER: Can you see that okay? Your Honor, I provided a copies of the time line and all the exhibits for the court's convenience.

THE COURT: Thank you.

MR. SMITH: For the record, I think we provided ours last week, too.

MR. COFER: Members of the jury, good morning.

Members of the jury, my name is Walt Cofer. We met very briefly yesterday. And along with Diane Chapman I represent Philip Morris. Now let me take just a moment and reintroduce some of the lawyers. You met them yesterday, it was very quick. You can at least keep in mind who is who. The Lorillard Tobacco Company is represented by Patrick McLaughlin and Craig Proctor. The American Tobacco Company is represented by Jim Milliman and Michael Suffern. And Liggett is

represented by Ken Walsh and Tod Matthews.

Now, one point I want to make right off the bat, these lawyers represent four completely different companies. They have sold different products. They had different employees. And they had their own unique histories.

But the claim that plaintiff has made against each of them is basically the same; and that is, that her husband smoked cigarettes that these companies manufactured and died of lung cancer, and that they should be held responsible. And because these basic

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claims are the same, you will be relieved to here we are not going to have 8 lawyers stands up and repeat the same things over. We are going to try to cooperate the best we can and divide that responsibility of presenting the evidence in this case.

But please bear in mind. Plaintiff has sued 4 completely different companies. In order for her to recover against any one of these companies, she must prove her case against that company. She must prove that company's products are defective and that company's products were proximate cause of her husband's lung cancer. That's what the court will instruct you.

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Now, Mr. Smith just took some time and he told you what he believes this case is about. What plaintiff believes the evidence will show. And now it's my turn to give you a preview of what we think the case is about.

David Tompkin smoked cigarettes from 1950 to 1965. In 1965 he stopped smoking cold turkey, had never smoked a cigarette the rest of his life. 27 years after his last cigarette Mr. Tompkin was diagnosed with lung cancer. 31 years after his last cigarette, Mr. Tompkin died of lung cancer. Those are the basic facts in the case. So with that, what are the big questions you have to decide?

The judge will give you a series of interrogatories that you will have to answer, but we think really to decide this case you really need to answer two questions.

Give me just a second to figure out how this works.

Can everyone see that okay?

We think at the end of the case the two questions you will have to decide are first, did cigarettes cause Mr. Tompkin's lung cancer?

And second, between 1950 and 1965, the time period that Mr. Tompkin smoked was the link as

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Mr. Smith told you, was the link between cigarette smoking and lung cancer common knowledge?

And let me just say one thing. And this is kind of a preview. Mr. Smith told you our position will be he knew and we didn't know. That is not our position. It is absolutely not our position.

Our position is that everybody knew the evidence linking cigarette smoking to lung cancer, everybody knew the studies.

Now there was a debate as to what the studies proved, whether the studies -- and we will go through this -- proved that smoking caused lung cancer. But our position is everybody was on notice. And I'll show you how ordinary people in Ohio read, heard and learned about the studies linking cigarette smoking to lung cancer.

The first question, did cigarettes cause Mr. Tompkin's lung cancer?

Members of the jury, the evidence in this case will be that cigarettes did not cause Mr. Tompkin's lung cancer. Asbestos caused Mr. Tompkin's lung cancer. Not cigarettes, not

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cigarettes and asbestos, but asbestos.

Let me make it clear, cigarettes can cause lung cancer, but that's not the question in this case.

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The question in this case is, did they cause Mr. Tompkin's lung cancer?

And when all the witnesses have testified, the evidence will be clear that Mr. Tompkin's simply smoked too few cigarettes too long ago for cigarettes to have caused his cancer.

Now, Mr. Smith referred to this, to Dr. Tomashefski. He's one of the expert witnesses who will appear in this case. He will be called by the plaintiff and he will tell you that asbestos was a cause of Mr. Tompkin's lung cancer.

Mr. Smith was very candid in his opening statement. He said asbestos was a cause. They will argue that cigarettes were too, but they will admit that asbestos was a cause. And what happened was, after Mr. Tompkin's death, they did a test, something that's called a fiber burden analysis, where you can actually measure the amounts of asbestos in a person's lungs.

And do you know what they found? They found Mr. Tompkin's had enough asbestos fibers in his lungs to put him within the range of somebody who has asbestosis, a lung disease that is only caused by breathing asbestos fibers.

The second question that you will be asked to

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answer, between 1950 and 1965, was the link between cigarette smoking and lung cancer common knowledge?

The evidence will be, members of the jury, that the studies that linked cigarette smoking to lung cancer in the 50s were front page news. They were reported in national magazines like Readers Digest, the most popular magazine in the country at that time. They were reported in Life, in Time, and in Readers Digest and News Week. We'll show you examples of those. And they were reported on the front pages of newspapers right here in Ohio. They were reported the front pages of papers like the Akron Beacon Journal, and I'll show you some examples, the Cleveland Plain Dealer, and they were reported in the Cincinnati Enquirer. They were front page news.

How do we know that's true? Mr. Smith showed you a time line of studies of republic and scientific literature. Those studies were done by outside scientists. Those studies were not done by tobacco companies. Back in the 1950's manufacturing companies did not have the sorts of sophisticated research and development departments that companies have today. Tobacco companies did not have fleets of in-house doctors and epidemiologists working for them, no company did.

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The 50s was a very different time. Those independent scientists, those outside scientists that Mr. Smith referred to with the studies, those people worked in academic settings like universities and teaching hospitals. And what the evidence will be is what they did, they did studies, experiments, just like Mr. Smith told you, and they wrote the results up

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in medical journals like the Journal of the American Medical Association, and then these newspaper reported those studies almost immediately after they were conducted.

And the evidence will be the ordinary person in Ohio learned of the evidence at the same time that the tobacco companies did.

Now let's talk just a little more about Mr. Tompkin's smoking history.

Mr. Tompkin began smoking in 1950; 1950, when he was around 15 or 16 year old. As Mr. Smith said, he began smoking Old Gold cigarettes because that's the brand that his big brother smoked.

Mr. Smith showed you some advertisements for Old Gold, but Mr. Tompkin said he smoked Old Gold because that's the brand his big brother smoked.

Mr. Tompkin's parents were nonsmokers. Mr. Tompkin hid his smoking from his parents because

he knew that they wouldn't approve. Clear back in 1950 when he started. As you can see, members of the jury, throughout the early to mid-1950's, Mr. Tompkin was a very light smoker, smoking just a few cigarettes a day. In fact, when we took Mr. Tompkin's deposition, he had no memory of even inhaling cigarettes before 1956. He had no memory of even inhaling the Old Gold, and the Philip Morris and about half of the Pall Mall cigarettes he smoked.

Now, as you can see, Mr. Tompkin didn't really become a smoker until about 1959 when he started averaging about a pack and a half a day of Tareyton.

In 1959, Mr. Tompkin would have been 24 or 25 year old. And you can see that he did become a fairly heavy smoking until 1965 when he stopped smoking cold turkey. Mr. Smith alluded to the incident. What happened, Mr. Tompkin was a bricklayer and, as we all know, that requires hard, physical work. And Mr. Tompkin noticed one day on the job in 1965 that he was losing his breathing capacity, he was losing his breath when he had to exert himself. And he said that he had been experiencing this shortness of breath for a couple of years, going back to 1963.

Common sense told Mr. Tompkin that smoking

was causing him to lose his breath. As Mr. Tompkin said in his own words, quote, it was the only other thing I was taking in other than oxygen.

So Mr. Tompkin made a decision. And he made up his mind and he put the cigarettes down and never smoked a single cigarette the rest of his life.

Now, plaintiff must prove, it's plaintiff's burden to prove that Mr. Tompkin's cigarette smoking between 1950 and 1965 was a proximate cause of his lung cancer in 1996.

Well, let's talk then about what the facts are on smoking and cancer.

As I told you before, cigarettes can cause lung cancer, but as we all know, not everyone who smokes gets lung cancer, and nonsmokers get lung cancer too. Studies show -- and I expect this will surprise you -- studies show that 10 percent of smokers get lung cancer. Can you see that, sir, am I in your way?

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In other words, 90 percent of smokers don't get lung cancer.

The evidence in this case will be -- is this podium blocking your view, sir? Can you see.

A JUROR: You can raise it up a little.

THE COURT: Is that better.

A JUROR: Yes.

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MR. COFER: Thank you.

The evidence will be that most people believe a much higher percentage of smokers get lung cancer. But the studies show that the evidence will be 10 percent do, 90 percent don't.

So how do you predict which smokers will get lung cancer? No one knows for sure. What we do know is the more you smoke and the longer you smoke the higher your risk of getting lung cancer.

Scientists call it a dose response relationship. That's important in this case because, relatively speaking, Mr. Tompkin didn't smoke very much, didn't smoke very long, and quit smoking for good when he was 30 years old.

Now, all of the experts will tell you, plaintiff's experts and our experts, that Mr. Tompkin had what was called a 15 pack year history. And the way you figure pack years, is you take the number of packs of cigarettes a day of someone smokes, you multiply it by the number of years they smoked, and you come up with pack years.

For example, if someone smokes one pack a day for 15 years they have a 15 pack year history. If they smoke a half a pack a day for 30 years, they have a 15 pack year history.

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You can see that Mr. Tompkin smoked different amounts at different times. But all the of the experts -- plaintiffs experts too -- will agree when you put it altogether he has about a 15 pack year history.

And we'll talk about the significance of that when we call the medical experts.

But a key fact, an absolute key fact is Mr. Tompkin's smoked his last cigarette when he was 30 years old, 31 years before his lung cancer. Now why is that important?

I'm sorry. I'm sorry, let me make it clear on that, and I have it on the charts, so there is no confusion. Mr. Tompkin smoked his last cigarette 27 years before he was diagnosed with lung cancer, 31 years before he died of lung cancer. I apologize, I misspoke. Thank you.

Well, he quit smoking 31 years before his death at age 30. Why is that important?

Who tells smokers to quit smoking? Doctors tell smokers to quit smoking, the public health communities, organizations like the American Medical Association, the American Cancer Society, the American Lung Association, the World Health Organization, all tell smokers to quit smoking. The Surgeon General

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tells smokers to quit smoking. Why? Because the evidence is clear, if you quit smoking your risk of dying of lung cancer drops dramatically.

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In fact, in 1990, the Surgeon General of the United States devoted an entire report to analyzing and summarizing the evidence which proves this is true. This is a copy of the 1990 Surgeon General's report.

So what happens when a person quits smoking?

Well, after 5 to 10 years of quitting, a former smoker's risk of lung cancer drops dramatically. The longer a person goes without smoking, the more his or her risk drops. And after 10 to 15 years of quilting, a former smoker's risk of lung cancer is about the same as someone who never smoked.

Now, don't just take my word for it, let's look at what plaintiff's own experts in this case will say.

One of plaintiff's key experts is a medical doctor named Alan Feingold. Dr. Feingold is a pulmonologist who practices in Miami, Florida. He has a lung clinic there. I took his deposition from this case back in June of this year and I had to wait for Dr. Feingold to become available. As I was sitting

there I saw a chart on his wall for his patients to read and it says when you quit smoking -- and I have a blow up of this. This is an exact copy of the chart that Dr. Feingold, plaintiff's expert, keeps on his wall in his waiting room in South Miami Hospital.

It says, when you quit smoking, and after five years -- am I getting feedback? Can you hear me okay?

After five years, according to Dr. Feingold, plaintiff's own expert, the lung cancer death rate for average smoker, 1 pack per day, decreases from 137 per 100,000 people to 72 per 100,000 people. After five years, the death rate drops almost in half from 137 to 72.

Well, look what happens after the ten years. After ten years -- this is according to Dr. Feingold -- lung cancer death rate for average smoker drops to 12 deaths per 100,000. Almost the rate of nonsmokers.

This was a chart that was up in on his wall for his patients to see, read and rely on in June of this year.

What does this tell us about Mr. Tompkin?

Mr. Tompkin did not quit for five years, he didn't quit for 10 years or 15 years, or 20 years, or

25 years. 27 years passed between Mr. Tompkin's last cigarette and when he was diagnosed with cancer. 31 years passed between Mr. Tompkin's last cigarette and when he died of lung cancer.

Members of the jury, the evidence will be that at the time that Mr. Tompkin's death, his risk of lung cancer from cigarette smoking was about the same as someone who had never smoked. His risk from cigarette smoking was about the same as a nonsmoker.

This one -- let me be clear about something. Mr. Tompkin died from lung cancer, there is no dispute about that. The issue is what caused his lung cancer?

Plaintiff's own experts will concede that asbestos was a cause of his lung cancer.

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I submit to you that the evidence will show that cigarette smoking was not. Not that cigarettes don't cause cancer, but that Mr. Tompkin smoked too few cigarettes too long ago.

Now, plaintiff's experts will admit that based on his smoking history, based on the Surgeon General's report, based on the evidence, it's hard for them to say that smoking was a cause. I'll be interested to hear how Dr. Feingold explains that chart when he tries to tell you smoking was a cause.

But I'll tell you what they have done. They

are relying on a new test, something Mr. Smith referred to, a test that Dr. Sidransky did. Sidransky is a molecular biologist at Johns Hopkins and he's a smart guy and big deal. And he did a test we called an LOH test, loss of heterozygosity.

Like Mr. Smith, I'm not going to explain it down. Here is the nub of it. What Sidransky will say is he found Mr. Tompkin had something called LOH at 3P, 9P and 19P. Those are markers on the cell on the gene of Mr. Tompkin.

So what he says is, based on this test, since I see he had LOH, loss of heterozygosity at 3P, 9P and 19P, I'll tell you that smoking caused his cancer.

The first question I had when I took his deposition, what is LOH? That may be a question you are asking. But here is the question I suggest is more appropriate. And that is, my question was, when I had to take his deposition, what the in the world is LOH?

What I learned was, the more important question is what does LOH have to do with Mr. Tompkin's lung cancer? Because, you see, Dr. Sidransky himself will tell you that you can have LOH at 3P, 9P and 19P, just like Mr. Tompkin had, and not get lung cancer. He will also tell you you can have

no LOH 3P, 9P and 19P, can be fine, and under his own study, you can get lung cancer.

And finally, what Dr. Sidransky will tell you, Sidransky did a study in February of this year, where he compared the incidents of LOH in people that had cancer, smokers and nonsmokers, and it is based in large part, but not entirely, on that study that Dr. Sidransky offers his opinions.

But he will admit when he takes the stand, maybe reluctantly, that there was no one in Dr. Sidransky's study who was anything like Mr. Tompkin. There was no one who had gone 27 years without smoking before a diagnosis of cancer. There was no one who had gone 31 years between his last cigarette and dying of cancer. And he will also tell you, he never even considered asbestos. He never even looked into asbestos.

MR. SMITH: If we could approach the bench for one minute?

(Discussion between court and counsel at the side bar, out of the hearing of the jurors, and off the record.)

MR. COFER: The question whether cigarettes caused Mr. Tompkin's lung cancer is a key issue in this case. It is a very important issue and there

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will be lots of testimony and evidence on that.

When I sit down Mr. McLaughlin is going to stand up and he's going to go in a little more detail what the evidence will be and who the witnesses will be. He'll talk about the fiber burden analysis, he'll also talk about the autopsy that Dr. Tomashefski conducted.

Let me just say one more thing about that. Many of us probably remember from health class in junior high and high school, if you look at a smokers lungs and you look at non-smokers lungs they look different. There have been shows on TV -- maybe some of you have seen them. When you look at a smoker's lungs you expect to see changes, you expect to see evidence of emphysema and chronic obstructive pulmonary disease and chronic bronchitis.

Not so with Mr. Tompkin. When Dr. Tomashefski examined Mr. Tomkin's lungs -- and he'll tell you this -- he found no evidence that Mr. Tompkin had ever been a smoker.

And why wouldn't he? He hadn't smoked a single cigarette in over 30 years.

All Dr. Tomashefski found when he examined Mr. Tompkin's lungs was a bunch of asbestos.

The second question that we believe you will

have to answer to decide this case, is between 1950 and 1965, was the link between cigarette smoking and lung cancer common knowledge?

And let me tell you why that's a critical question in this case. Under Ohio law, plaintiff has to prove more than that cigarettes were a medical cause of Mr. Tompkin's cancer. Plaintiff has to prove that the cigarettes that these companies sold were defective, and it was a defect in the cigarettes which was a proximate cause of the cancer.

Plaintiff has that burden. And this question is important, because of something that is known as the common knowledge defense.

And first, let me say, it's called the common knowledge defense because we have the burden of proving it. It's a defense, the defendants have the burden of proving it. Plaintiff must prove cigarettes are defective, plaintiff must prove a defect was a proximate cause of the cancer, but understand Ohio law, and this is our burden to prove, the cigarettes that the defendant sold were not defective. They were not defective.

If during the time Mr. Tompkin smoked, the ordinary person with the ordinary knowledge common to the community recognized the nature and extent of the

link between smoking and lung cancer.

That's the common knowledge defense, it is a complete defense to all the plaintiff's claims.

Now, I told you that the studies -- and Mr. Smith demonstrated that the studies linking cigarette smoking to lung cancer, those were not secret internal studies the tobacco companies did, those were studies done by outside scientists, they were reported in medical journals, they were talked about in Life magazine and Readers Digest and in local

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newspapers. And let me give you just an example from the Akron Beacon Journal.

Akron Beacon Journal. Let me see if I can tighten in on this. And I have a board, and when our witnesses come on we'll show you the articles, we'll put the articles up for you to see. But can you just see the headlines at left?

The first one is June 21, 1954. Men 50 to 70 die sooner if smokers.

The second one, June 6th, 1955. Link cancer cigarettes in new report, risk cut if smoker quits.

The third headline, Believe lung ailment due to cigarettes, December, 1955. And you can't read it but the first sentences is, cigarette smoking widely blamed for lung cancer.

Down here 1956, backs cancer, cigarette link.

Again 1956, test links cigarette tars with cancer in 1957. New study ties cancer and cigarettes.

This is the Akron Beacon Journal, members of the jury. And what was Mr. Tompkin doing at this time? He was smoking just a few cigarettes a day. And the evidence will be that Mr. Tompkin read the Akron Beacon Journal.

Now, in order to really appreciate what the ordinary person in Ohio was reading and seeing and hearing about smoking and lung cancer in the 50s and '60's, it's important to back up a little bit and put things in context. And I'll tell you, when we call our witnesses we'll try to put things in context. It's always dangerous to pull snippets out of articles without putting it all in context. Let me give you just a little bit of the background.

Cigarette smoking is not a new custom, and it's not something these defendants convey. Tobacco has been around a lot longer than these companies have, literally hundreds of years people of many cultures have used tobacco. They chewed it, they smoked it in pipes, they rolled it in cigars, they made cigarettes by hand. And the interesting thing is, while there have been times that tobacco, and

especially cigarettes, have been very popular -- and Mr. Smith alluded to that last sentence -- cigarettes were very popular, lots and lots of people smoked. Doctors, ordinary people, prominent people, smoking was very popular.

But even though it was popular, at the same time smoking was criticized as being immoral and bad for health. Maybe you heard the old phrases, cancer sticks and coffin nails.

The evidence will be that cigarettes have been referred to as those for decades. Did you know in the early 1900s -- can you see that, number 2? 16 states actually banned the sale of cigarettes in this country.

Now, we all know about alcohol and prohibition, but how many of you knew that there were 16 states in this country where you couldn't buy a smoke?

Smoking restrictions at work are now common. Walk by any building in Ohio and you see people standing outside smoking. But did you know that

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decades ago prominent Americans like Thomas Edison and Henry Ford wouldn't let their employees smoke. Ford wouldn't even hire a smoker. Do you know why? Because he felt they got sick too much and they missed

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too much work.

Now, while cigarettes have long been criticized, beginning in the 1950's the nature of the criticism changed in a major way. I'm going to show you some overheads, but our witnesses will testify it was really beginning in 1950 that the first credible evidence linking smoking to lung cancer was published.

Mr. Smith was exactly right, there were sporadic accounts in science before 1950. And I asked you about the year of the Ochsner & DeBakey article that he was reading, that he told us was 1939. Ochsner & DeBakey, the same researchers published another article in 1947 in the Journal of the American Medical Association. Remember the article that Mr. Smith showed you they said, smoking causes cancer? They were convinced.

Here is what those same authors wrote, in 1947. The apparent increase in the incidence of carcinoma of the lung, cancer of the lung stimulated much speculation concerning its cause. The numerous explanation demands to account for this fact have been reviewed in previous publications. In the analysis of this series, none of these factors was found to bear a significant relation to the occurrence of the disease.

Both occupation and smoking, which had been

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particularly emphasized by some observers as possible epidemiologic factors -- epidemiologic means cause -- in which we were inclined previously to consider more seriously, were found to have no special significance in his analysis.

Ochsner & DeBakey changed their minds in the late 40s. What we'll talk about, the evidence was out there for people to see. The question was, what conclusions could be drawn from the evidence?

Well, 1950, things really took off.

It was in 1950 that the first credible scientific studies linking cigarettes to lung cancer were published, and they fell into two types of studies; epidemiological, or statistical, studies and mouse skin painting studies.

You can't really see that very well, but I'll tell you about it.

What the epidemiology showed was if you look at a group of people with lung cancer, more of them were smokers than nonsmokers, the epidemiology showed pretty clearly that more smokers than nonsmokers get lung cancer.

What the mouse skin painting studies showed, and there were earlier ones before 1953, but you will hear most of those were negative. But in 1953 there

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was a positive study and it showed if you shaved the backs of mice and applied condensed tobacco tar to the back of those mice, half of those mice got skin tumors.

Now, in the 1950's epidemiology was a new science. It's application to chronic diseases like

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cancer was new. And at the time no one thought you could prove cause and effect through statistics or epidemiology alone.

Mouse skin painting studies showed if you painted tar on the backs of mice you could get skin tumors. But even Dr. Wynder, the scientist in St. Louis who did the study, says this doesn't tell us anything about smoking and lung cancer.

But make no mistake about it, ladies and gentlemen of the jury, these studies were a big deal and they got a lot of attention, they got a lot of publicity, they caused a lot of alarm, they alarmed smokers, they alarmed doctors, and they alarmed cigarette companies.

And again, these weren't secret studies, let me show you the science.

Can you see those? Is that too low?

These certainly weren't all the studies, these are the major studies published during the time that Mr. Tompkin was smoking.

As Mr. Smith told you, it really starts in 1950 with two epidemiological studies, Wynder & Graham did their study at Barns Hospital in St. Louis. Doll & Hill did their study in Great Britain. Actually, Doll & Hill published one in 1950 and one in 1952. Wynder & Graham's article was published in the Journal of American Medical Association in June of 1950. Doll & Hill's articles was published in the British Medical Journal.

Let me show you how they were reported.

Here is what Readers Digest had to say about Wynder & Graham. And you can't see it, but this article was published in January of 1950. This article was published six months before the Wynder & Graham study itself was published. And it says, and it does allude to the earlier studies. This probably refers to the most extensive and reliable research yet made in this field, which is now being completed by Drs. Wynder & Graham. It is expected to show that over 95 percent of patients with lung cancer smoke a pack of day or more and have done so for many years.

Six months before the study itself was published readers of Readers Digest learned about it, the most popular magazine in the country. Here is what Newsweek had to say about Wynder Graham.

In the past 50 years the incidence of lung

cancer has increased to the point where it is now one of the leading forms of cancer in men. Last week in the Journal of the American Medical Association a survey brought this relationship out of the rumor category.

The point I'm trying to make is the popular press reported these studies in one instance before the study itself and in this instance a week after the study came out.

What were Ohio newspaper saying?

Here are two articles from the Cincinnati Enquirer. I'll show them to you one after another about Doll & Hill, the work that was done in Great Britain, this was 1950. Smoking factor in cancer. A new British study says smoking seems to be an important factor in producing cancer of the lung. 1952 lung cancer rises with smoking.

These were British studies that were being reported in the Ohio newspapers. My point again is these

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studies were getting a lot of attention.

And this just shows how Time magazine also reported the 52 Doll & Hill. You'll have a chance to see these in detail when we call the witnesses. Right now I want to give you a feel for the evidence.

The mouse skin painting studies, he said, was a big deal; as Mr. Smith told you, it was a big deal. 1953, how was it reported? Life magazine. And I'll show you the

coverage from Life. It's significant because Life was a pictorial magazine. You didn't have to read a bunch of articles, you saw the pictures. And, as you can see from here, the pictures are pretty vivid.

Can you see those okay down at the bottom? Is that -- I have a board, but the bottom line is -- it just shows Dr. Wynder and Graham with the myself, and you can see it is not just a small article.

Can you see that okay? Everybody?

The Cleveland Plain Dealer, like the other Ohio newspaper, ran an article about the Wynder Graham, and they quoted one researcher as saying, this shows conclusively there is something in cigarette smoke which can produce cancer. This is no longer merely a possibility; our experiments proved it beyond a doubt.

I have a board of this editor's note I'm going to read to you in a moment, so just bear with me on that.

So far we've got the 50 and 52, epidemiological studies we have the within the Wynder Graham mouse painting studies. You will hear these are the big studies. You can see how they are reported in national and local publications.

The next big one was the American Cancer Society. They did what's called a prospective epidemiological study, a powerful study. And it was

reported in Time and Newsweek.

Newsweek says, in New York, the American Cancer Society for the first time took official action to warn the public of the possible dangers of smoking. The presently available evidence indicates an association between smoking, and particularly cigarette smoking, and lung cancer.

Just again examples of Ohio newspapers and how they reported that study. This is the Akron Beacon Journal. Men 50 to 70 die sooner if smokers -- this is the Akron Beacon Journal -- and there is one from the Cleveland Plain Dealer, too. Again, you will have a chance to see these in detail. I just want to show you so you can get a sense of what was being reported.

In 1954, June of 1954, the Gallup organization ran a poll. They actually ran one in January, ran one in June, they ran others throughout the 50s.

Here is one poll, June of 1954. They asked the ordinary person: Have you heard or read anything recently to the effect that cigarette smoking may be a cause of cancer of the lung?

90 percent said yes. 90 percent of ordinary people polled in 1954 answered yes to the question have you heard or read anything recently to the effect that cigarette smoking may be a cause of cancer of the lung?

We are trying to look back in time and judge what people knew in the 50s. That's a hard task to do. We

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inevitably have hindsight; we have our experiences. It is hard to take ourselves out of the present and put ourselves back in time and judge what was going on in the context of when it occurred. But here is something that might help.

Here is what the Surgeon General of the United States had to say in 1957 at a congressional hearing about whether the word was getting out. Surgeon General Ralph Leroy Burney: Our position is that we have informed the public through the excellent coverage of the press, radio and TV. We believe -- Surgeon General -- that this is as far as we should go at this time until and when we have additional information.

John Heller, Director of the National Cancer Institute also in 1957: Numbers, radio, TV and other media, have done an excellent job covering this problem, and a very objective job. This is an exceedingly valuable way of informing the public.

And, members of the jury, in 1964 when Congress was considering putting a warning on the pack, the medical association says the health hazards of excessive smoking have been published for more than 10 years and are public knowledge. According to the AMA, the hazards of cigarette smoking was common knowledge in 1964.

The plaintiff will have to prove that the defendants should have warned the ordinary people in Ohio of specific links between smoking and lung cancer. And if they would have just done that, Mr. Tompkin wouldn't have smoked and wouldn't have gotten lung cancer.

We believe the evidence will show that telling the ordinary person in Ohio that smoking was linked to lung cancer wouldn't have told him or her anything they didn't already know. That's because it was common knowledge. It was reported in national magazine, local papers, people heard it, read it, they got the message.

Now, I wrote his words down. I don't recall exactly. Mr. Smith suggested that the companies essentially denied that smoking caused cancer. The chart he knew we didn't know.

The companies never denied that smoking was linked to lung cancer. They never denied the evidence. What they questioned was scientifically whether statistics in mouse skin painting proved that smoking caused lung cancer in people. And the evidence will be that many important independent scientists also questioned whether the evidence proved it. Not the evidence, but what the evidence proves.

Would you have -- and I have a board from 1954, Cleveland Plain Dealer, that summarizes this better than I

ever could. Remember when the Wynder & Graham mouse skin painting study was published it was reported in national papers and in the Plain Dealer and local papers. Here is how the researcher was quoted, but here is what the editor of the Cleveland Plain Dealer said in 1954.

Quote: Everybody knows the old saying, every time you light a cigarette, you put another nail in your coffin. Today, some medical researchers say there may be something to it. Others put up strong arguments to the contrary. Either way, there is grave concern over the question, does cigarette smoking cause lung cancer.

Here is the broad picture of the pros and cons in this spreading controversy.

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No one denied the evidence, people made different judgments as to what the evidence proved.

Well, in 1964 the Surgeon General ended the debate. In 1962 President Kennedy appointed the Surgeon General's Advisory Committee. This committee consisted of a blue ribbon panel of scientists who were charged with reviewing all the evidence on smoking and lung cancer and making a recommendation so we could have a national policy.

Now, the interesting thing, in order to be on this blue ribbon panel in 1962, you know what the qualification was? You had to have an open mind. You could not have already prejudged the evidence.

Well, what this blue ribbon committee did, they reviewed all the evidence. You know what they found? They found well, science does not know how cigarettes cause cancer. Science does not know the specific agents or agents in cigarette smoke that causes lung cancer.

But the Surgeon General said, you know what? That may be what we don't know, but I'm making the call. I call the balls and strikes. I'm making the call. I think we know enough, so I'm making the policy judgment that from this point forward it is the official position of the United States Government and the United States Public Health Service that cigarettes are a proven cause of cancer.

Congress got the act. We had the Federal Cigarette Labeling Act. Beginning January 1st, 1966 not a single cigarette has been sold in this country without a warning on the pack. Cigarettes were permitted to be sold with just a warning on the pack.

Well, what does this have to do with Mr. Tompkin?

Mr. Tompkin quit smoking in 1965. Mr. Tomkin did not need a warning to tell him that smoking was affecting his breathing. He didn't need a warning because it was common sense.

As he said in his own words, it was the only

other thing I was taking in, other than oxygen. He also didn't need it because it was common knowledge. Ordinary persons in this country, and ordinary persons in Ohio knew that smoking was bad for their health. That smoking could cause breathing problems, that smoking was dangerous, and that smoking was linked to lung cancer.

Well, let's go back. I want to end my opening statement the way I began it, with the two questions you must answer.

Assuming I can find my chart, which I can't, so I'll just tell you.

The first question is: Did cigarette smoking cause Mr. Tompkin's lung cancer?

The evidence in this case will be no it didn't. Mr. Tompkin simply smoked too few cigarettes too long ago.

What caused it?

Asbestos caused it.

The second question: Between 1950 and 1965 was the link between cigarette smoking and lung cancer common knowledge?

The answer to that is, it was front page news. This, these studies were done by outside scientists. They were reported in medical journals. They were picked up by the popular press. They were common knowledge and the

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ordinary person knew it. And telling the ordinary person

that smoking was linked to lung cancer wouldn't have told then them anything they didn't already know.

And Judge Dowd will tell you, under Ohio law, cigarettes can be defective or not defective if the link between smoking and lung cancer was common knowledge during the time Mr. Tompkin smoked.

Ladies and gentlemen, thank you very much. I appreciate your attention for these last 45 minutes. I know you are getting hungry. I thank you now, and we are going to stop for the break and we'll see you after lunch.

THE COURT: Thank you. We'll take the luncheon recess at this time and resume at 1:30. So please be back in the jury room ready to go at 1:30. You may file out.

(Luncheon recess.)

AFTERNOON SESSION

THE COURT: Just be seated.

Is Debbie going to come and get them or what?

THE CLERK: Oh, do you want me to get them?

THE COURT: Well, I think they are all ready, yes.

THE CLERK: Okay.

(Jury in).

THE COURT: Please be seated.

Mr. McLaughlin.

MR. McLAUGHLIN: Good afternoon.

May it please the Court, Judge Dowd, Mrs. Tompkin, learned counsel, ladies and gentlemen of the jury.

I have been introduced to you before. I am Patrick McLaughlin, but this is my first chance to speak with you. I practice law up the road apiece in a town called Cleveland, and I stand before you today on behalf of the Lorillard Tobacco Company and the over 3,000 men and women who work for Lorillard. And my co-counsel, also introduced, is Craig Proctor.

Walt Cofer addressed a number of issues with you on opening statement, and we are grateful to him for doing so. I'm not going to cover those issues.

I'm going to speak to you mostly about the medical issues in this case. And let me say, ladies and

gentlemen, at the outset that we do not intend to disparage the memory of David Tompkin or his family. By all accounts, you will see and we believe when you observe the videotape trial deposition of David Tompkin, that he was a decent, well-read, independent, responsible family man.

This dispute is not about David Tompkin. Rather, this case is about the claims brought by his estate, and by Mrs. Tompkin, and our response to those claims.

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Now, and you will see, as I think you have on opening statement, that the parties will agree pretty much to the smoking history. It's not going to be in dispute, the amount of cigarette smoke, the duration of the smoking history. That is not in dispute.

What is in dispute, ladies and gentlemen, is the medical and the scientific evidence in this case. I guess you can say this is a battle between the experts.

There is no question that expert testimony is key in this case. Each side will present its experts in an attempt to persuade you of the correctness of our respective positions.

But keep in mind, though, ladies and gentlemen, that it's not enough for an expert witness to take the witness stand and tell you what he or she believes. That witness must also be reliable, objective

and credible in his or her testimony.

And it is you, ladies and gentlemen of the jury, as Judge Dowd has told you, who must decide whether to believe all of what a witness says, some of what the expert says, or none at all. That is solely committed to your province as the fact-finder in this case.

Keep in mind that not all expert witnesses are created equal.

Let me represent to you that I and the other defense counsel in this case will work very hard to present to you expert witnesses and testimony which is reliable, objective and credible. We believe that's our obligation to do it, and we shall do so in this case.

What is the fundamental core of the defense case on the issue of medical causation? It is, as Mr. Cofer described to you on opening statement, David Tompkin smoked too little, too long ago for there to be a causal association between his cigarette smoking and lung cancer. It is not disputed that David Tompkin began smoking at a young age. He did so, to be like his brother and his friends. Not an uncommon story.

But David Tompkin, by his own testimony, may not have inhaled during the early years of his smoking. And, frankly, the evidence will clearly show that over the course of his smoking history, he was a light smoker.

By 1965, he had decided to quit. He quit cold turkey. He was 30 years of age. As we said, it was '65. He would live until 1996, when he unfortunately passed away because of lung cancer. He was 61 years of age.

What were the risk factors in David Tompkin's life? You will certainly learn during this case that medicine and science does not know everything about cancer. Medicine does know, however, that there are many risk factors associated with lung cancer. Cigarette smoking is one of those risk factors.

There are other risk factors, and you will hear about those because they were important risk factors in David Tompkin's life.

An important risk factor was asbestos. Mr. Tompkin was exposed to asbestos in the workplace as he was a bricklayer. For 40 years David Tompkin cut brick and inhaled the brick dust. He was also occupationally exposed to silica, another known risk factor for lung cancer. And he also worked in the rubber industry in the early years,

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in the curing process, which also contained asbestos.

Then, Mr. Tompkin worked without protective gear.

You will hear testimony of Mr. Tompkin's family history of cancer, close family members who have

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come down with cancer. Cancer ran in David Tompkin's family.

The testimony will be that of all these known risk factors, the most probable cause of David Tompkin's lung cancer was asbestos. You will hear that once exposed to asbestos, and the fibers of a certain size enter one's lungs, they remain there forever. Not so with cigarette smoke. How do we know this? We know this from the epidemiology and the pathology.

For example, Dr. Peter McCue, a respected pathologist, reviewed the autopsy slides and examined the lung tissue of David Tompkin. Dr. McCue will explain to you that there was no evidence, upon autopsy finding, that David Tompkin had been a smoker.

This is not surprising, because he quit smoking 30 years before he passed away.

And there will be no disagreement among the medical witnesses who testify in this case as to what they tell their patients who smoke: Quit.

There are health benefits to quitting smoking. And Mr. Tompkin, who quit for 30 years, was the beneficiary of those benefits, benefits which, by the way, do not apply to asbestos because, as I told you, once the asbestos fibers reach the lungs, asbestos fibers of a certain size reach the lungs, they don't leave.

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Now, is it the defendant's burden to prove that asbestos was the cause of lung cancer in David Tompkin? No. The defendants do not have the burden of proof in this case. Plaintiff does, and plaintiff must prove her case by a preponderance of the evidence.

But even though we don't have the burden of proof, ladies and gentlemen, we will work very hard to present to you the reliable, objective and credible medical evidence which points the way.

And we believe that the evidence will show that asbestos was the most likely cause of lung cancer. And none of the defendants in this courtroom have any responsibility for David Tompkin's exposure to asbestos in the workplace or otherwise.

Now, since you must determine the credibility of each of the testifying witnesses, keep in mind the importance of examining the reasons advanced by an expert in support of his or her opinion.

For example, I have mentioned to you the importance of reliable testimony. Is the testimony well-grounded in proven concepts and based upon medical theories that have been published in medical journals and replicated by others? Or is the opinion advanced merely a hypothesis?

A hypothesis is a tentative theory

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unsupported by the facts necessary to prove its truth. A hypothesis can be merely speculation or conjecture.

Keep a close look out for those experts in this case who would take the witness stand and testify as to a hypothesis rather than well-recognized and accepted

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medical truths.

One of those experts is plaintiff's expert Dr. David Sidransky. He bases his opinion on medical causation in this case on a hypothesis, a hypothesis based on a study done on only 45 people.

Now, my time is limited so let me move now to provide an overview of what we expect the reliable, objective and credible medical evidence will be in this case.

Remember, I told you that we would work very hard to provide you the evidence you need to make the correct decision in this case, and so that you may be confident in the decision that you reach.

As to medical causation, the primary issue in this case, we will offer medical testimony which crosses several lines, specialty lines, in order to assist you in your duty as a juror.

First, we will present statistical, biostatistical and epidemiological evidence which will address whether a disease is statistically associated with

a risk factor.

Epidemiology is a science that identifies statistical associations between disease and factors.

We will call Dr. Edwin Bradley to the witness stand. Dr. Bradley is a Ph.D., biostatistician, a professor emeritus at the University of Alabama at Birmingham, and a principal in a consulting firm in Birmingham. He is the only statistician or epidemiologist who will testify before you in this trial. He has spent his professional career looking at these issues, working with scientists and physicians in order to publish epidemiological articles drawing associations between risk factors and disease.

Dr. Bradley has reviewed the medical and scientific literature, and he will testify that quitting smoking results in a significantly reduced risk of lung cancer.

Dr. Bradley analyzed the raw data obtained from a large American epidemiological study conducted by the American Cancer Society called CPS 2. This was a massive epidemiological study involving 1.2 million people.

In analyzing a group of males, a cohort that Dr. Bradley culled out of that study, he found that there was no statistical association between cigarette smoking and an increased risk of lung cancer. That group of males

constituted a group very similar to David Tompkin.

Specifically, Dr. Bradley will testify about relative risk. In this case, for example, relative risk would consider the incidence of disease in a smoking population versus the incidence of disease in a nonsmoking population, and compare the two to see if there are any statistical associations.

Dr. Bradley will testify that a relative risk blow 2.0 is too weak to support conclusions that an exposure is associated with a disease. The bottom line, from a biostatistical epidemiological standpoint, based on David Tompkin's smoking history, he will testify that it was below 2.0 and not statistically significant and, therefore, there was no increased risk of lung cancer in David Tompkin. Or to put it another way, because Mr. Tompkin smoked too little, too long ago, his relative

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risk to contracting lung cancer was not statistically different from males his age who had never smoked.

Now, Dr. Bradley has taken into account that Mr. Tompkin was also exposed to asbestos. Based on the CPS 2, American Cancer Society data which did account for exposure to asbestos, Dr. Bradley found a relative risk above 2.0 and which was statistically significant, demonstrating an increased risk to lung cancer from asbestos exposure.

And he will also address that increased risk as it relates to asbestosis, which is significantly higher.

Lastly, he will address the testimony of Dr. Sidransky and the reliability, if any, of that testimony as it relates to statistical methodology and probabilities.

Second, in addition to epidemiology, we will present the testimony of a medical oncologist, Dr. Michael Sherry, who has treated hundreds of patients with lung cancer over the years. Dr. Sherry is board certified in internal medicine, medical oncology and hematology, three separate boards.

Since he's from Pittsburgh, he is also familiar with exposure to asbestos in the workplace, and that is a part of his clinical experience which he will address with you.

Dr. Sherry published a book in 1994, and you will see that what he wrote in his book before he had heard of the Tompkin case is relevant to the medical issues in this case.

Dr. Sherry will testify that in light of Mr. Tompkin's remote smoking history and because of the significant risk reduction of that quitting, Mr. Tompkin's lung cancer was most likely not related to his smoking history.

In his book, which he wrote for the lay person, for cancer victims and their families, Dr. Sherry states, and I quote, "Admittedly, the development of lung cancer is a complex process currently defying any single explanation. However, the cessation of smoking is one critical solution to the problem. A smoker's risk of lung cancer decreases steadily for 15 years following cessation at which point the risk of the former smoker begins to approach that of a person who has never smoked," end of quote.

Steadily for 15 years. Here, of course, we had a cessation period of 30 years. Dr. Sherry will discuss the other risk factors to lung cancer and David Tompkin, including exposure to asbestos and his family history of cancer.

In addition, Dr. Sherry will tell you that Mr. Tompkin's lung cancer is not typical of the adenocarcinomas he has treated over the years.

Another respected clinician is Dr. David Parkinson from Stony Brook State University of New York. Dr. Parkinson has spent a career dealing with diseases of occupational exposures, principally the building trades and other unions, very much like the kind of work that David Tompkin had done as a bricklayer.

Dr. Parkinson is board certified in

occupational medicine. This is the third specialty area we

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present to you to assist you in your duties.

Dr. Parkinson will testify to a reasonable degree of medical certainty that David Tompkin's lung cancer was induced by his cumulative exposure to asbestos. He will further testify that because of Mr. Tompkin's remote smoking history, it is his opinion to a reasonable degree of medical certainty that the contribution of cigarette smoking to his lung cancer is di minimus, if at all.

Most importantly, it cannot be said that cigarette smoking was a substantial contributing factor in David Tompkin's lung cancer.

After presenting epidemiological testimony and the testimony of the two clinicians, the medical doctors who treat patients with lung cancer and with occupational disease, we then turn to the pathology which is the fourth specialty area we present to you.

Dr. Peter McCue is board certified in anatomic pathology and serves as the director of surgical pathology at the Jefferson University Hospital in Philadelphia. Dr. McCue will testify that Mr. Tompkin's history of cigarette smoking did not contribute to his lung cancer. Rather, Mr. Tompkin's history of occupational exposure was a substantial contributing cause of the lung

cancer.

He will show you the pathologic evidence in Mr. Tompkin's lungs and, conversely, the lack of any evidence in that same pathology that Mr. Tompkin had been a smoker.

His testimony will be consistent with that of the other experts. It's well-recognized that the relative risk of lung cancer in smoking steadily diminishes over time after quitting.

In contrast, the relative risk of lung cancer from occupational exposure to asbestos does not decline with time since last exposure.

He will also testify consistent with other defense experts that Mr. Tompkin's peripheral adenocarcinoma is the cell type of lung cancer most commonly seen in occupational cancer, and the most common type seen in nonsmokers.

Dr. McCue will reemphasize the importance of certain tests performed by plaintiff's own expert, Dr. Tomashefski, in the testing of Mr. Tompkin's lymph nodes for P53 gene product and for mutations in Codon 12 of the K-Ras oncogene. I know it's a mouthful, but it will become clearer to you as the evidence goes in and you will understand these tests and the significance of these tests in this case.

The results of those tests show no alteration in gene product or evidence of K-Ras mutation. In other words, as Dr. Tomashefski will admit, the results of those two tests weigh against a finding that David Tompkin's lung cancer was caused by smoking.

Dr. Peter McCue will also address the testimony presented by Dr. David Sidransky, as we've indicated, one of plaintiff's principal experts in this case.

Dr. McCue will explain to you why the type of testing Dr. Sidransky did cannot be relied upon to identify the cause of David Tompkin's lung cancer.

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He will explain that Dr. Sidransky's work is merely a hypothesis, yet to be replicated by others, and certainly yet to be proven.

It is fascinating work, to be sure, according to Dr. McCue, but very, very preliminary.

That's a quick overview, ladies and gentlemen, of the reliable, objective and credible medical evidence that we intend to present to you during the course of this trial.

It's not easy to synthesize complex medical issues into a quick overview, particularly when time is limited, and to make it coherent. And I hope that I have not failed you in my obligation to do just that, as you

undertake the important responsibility of deciding this lawsuit.

When all the evidence is in and Judge Dowd has instructed you on the law, I will come before you on closing arguments and I will remind you of what I have said today the evidence will show.

And at that time, I will argue that the reliable, objective and credible and medical evidence and testimony in this case leads inescapably to one correct conclusion, and that is that plaintiff has failed to prove that cigarette smoking was a proximate cause of lung cancer in David Tompkin.

And at that time, ladies and gentlemen, I will ask that you return a verdict in favor of the Lorillard Tobacco Company.

I thank you so much for the attention you have given me, and I know that you will give the same degree of attention to Mr. Milliman and to Mr. Walsh as they stand before you to make opening remarks on behalf of their clients.

Thank you very much.

THE COURT: You may proceed.

MR. WALSH: May it please the Court, Judge Dowd, Mrs. Tompkin, ladies and gentlemen.

My name is Kenneth Walsh, I'm an attorney,

I'm from Cleveland.

My associate is Tyler Mathews who is here with me.

Together we represent Liggett Group Incorporated, which is one of the defendants.

Now, Liggett is a company that you may have not heard about. Liggett is spelled L-I-G-G-E-T-T. It's not currently in the news. It's a small manufacturer today of no-name tobacco products. It's headquartered in Miami, Florida. Back in the fifties and sixties, it was located in Durham, North Carolina.

It produced, by manufacture at that time, two cigarette brands that you saw on the time line charts that were relevant to Mr. Tompkin's smoking history.

Mr. Tompkin claimed that he smoked Chesterfield which was a nonfilter premium brand cigarette. He claimed in his deposition that he smoked about ten cigarettes a day when he was a young man, 1957 to 1959.

He really didn't become a significant or serious smoker until later, until the 1960s. And I think the evidence will show that he claimed to smoke Lark cigarettes, which you saw on one of the ads was an early filter cigarette, the one with the charcoal in the filter

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itself.

He claims to have smoked that brand, premium

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brand of filter cigarette, in 1964 and 1965. By that time, by Mr. Tompkin's testimony, he claims to have smoked about two and a half packs per day.

Now, a trial is a story, and it's a trial that's a story told by the presentation of evidence. And Mr. Tompkin, you'll see his videotape deposition, he testified, he provides evidence that goes back a long time ago about his smoking history and his experience with tobacco.

And he was introduced to tobacco products not by advertising, not by newspaper, not by television, not by radio. He was really introduced by a friend, like so many people have been introduced to smoking, and were at that time.

So his influence, it was a personal influence; not an advertising influence. So in terms of what is alleged in the nature of a claim of a warranty breach or breach of promise by one of the tobacco companies such as my client Liggett, I ask you to consider the evidence that we expect to be presented that Mr. Tompkin was really influenced by his own choice, by his own desire to be like his friends and to smoke a tobacco product, which he did.

And then I'd like you also to consider from his own testimony that when he smoked Lark cigarette and he

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disclosed that he smoked Lark cigarette, when you see his deposition, you'll see he really had almost no recollection of having smoked a Lark cigarette until a day or two before his testimony was taken in 1994.

It's true that when he smoked, he smoked a long time ago. And that shows, because he couldn't even really remember. But that cigarette, Lark cigarette, was introduced to him by a person -- not by advertising -- and a person close to him. And that was his influence and that was his choice that he made at that time.

Now, that's part of the story. Part of the story is from Mr. Tompkin's own mouth.

The other part of the story is what was the conduct of Liggett Tobacco as a manufacturing company in or about the 1950s and 1960s.

Now, I'm not familiar with all of the documents that are liable to be produced here in trial. I haven't seen all of the documents that are liable to be produced here at trial. But I really don't anticipate that you'll hear anything about how Liggett obtained its tobacco, whether it grew it, whether it bought it through brokerage, whether it bought it on an open market. You won't hear anything about how its tobacco was processed.

You won't hear anything about how Chesterfield brand or Lark brand cigarettes were

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manufactured. You won't hear anything about the nature and quality and specifications of the Chesterfield product back in 1957 to '59.

Nor will you hear any similar evidence about the Lark tobacco product in 1964 or 1965.

There will not be any showing of a manufacturing defect or a design defect. We don't anticipate any such evidence.

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We do know that when Mr. Tompkin smoked the Lark cigarette in 1964, '65, he smoked it after the Surgeon General's report was issued to the general public. I think that's a very important fact for you to consider.

Now, we are not going to take, on behalf of Liggett, a significant laboring either in the cross-examination of the plaintiff's witnesses or in the presentation of evidence in the courtroom. But we are going to be here, we are going to participate, to the extent that we do participate in examination at some time.

We will be here at the closing of the evidence of the case. And I'll stand before you and I'll ask you to account for the promises made to you by Mr. Smith as to what he promised to prove in this particular case.

Liggett has worked with the co-defendants to conserve time, to conserve effort and the energy, and

Liggett in this case really respects the work that's been done by the co-defendants. We respect and appreciate the evidence that will be produced, both as to the question of proximate cause, as Mr. Cofer outlined initially, and as Mr. McLaughlin just outlined to you a few moments ago.

We trust and appreciate that they are going to make a significant production on the common knowledge issue. We respect the evidence that they expect to present to you. And we will ask you to take the co-defendants' presentation into consideration in your consideration of the claim against Liggett.

Thank you very much. I appreciate it. And we will talk to you at the closing of the case.

Thank you.

THE COURT: Thank you.

You may conclude.

MR. MILLIMAN: Your Honor, ladies and gentlemen, you can relax. I'm last, so I should be about -- hopefully about 20, 25 minutes at the most. And I'll try to get through this as fast as I can. But you know we are about through and we will get into the evidence.

My name is Jim Milliman, and I have the privilege during this trial of representing the American Tobacco Company.

I grew up about 60 miles down Highway 18 in Norwalk, Ohio. But if I sound kind of funny, which I'm sure I do to a lot of you, it's because I've lived in Louisville for the last 30 years where I practice law.

But let me say this: It is nice to be back in northern Ohio, and I'm glad I'm not back in January because I do not have fond memories of northern Ohio in the winter, believe me.

At this time I'd like to introduce my co-counsel Mike Suffern. He's going to help handle the charts. Mike is from Cincinnati, and you will see him in this case primarily with a couple of the medical expert witnesses.

Before I begin my opening, first let me say this: It is never pleasant to be involved in a case in which there is a personal tragedy, whether it be an injury or a death. And the fact that we are going to defend this case vigorously does not in any way mean that we do not sympathize or respect Mrs. Tompkin, and her family, in the

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loss that they have suffered. We do.

But what's great about our system of justice in this country, as what the Judge told you yesterday, we can take ten people -- and now nine people -- from various walks of life, from various cities and come together in a common cause and spend three weeks. And you people have

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given up your time and income to come together and do justice.

And in doing this, as the Judge said, we've put aside sympathy, we put aside our emotions and we put aside our prejudices, and we collectively review all of the evidence in this case. And we reach a common judgment.

And that's what makes this country the country it is, because people are willing to give up their time and do justice. And for that, everyone in this courtroom is very grateful.

Let me tell you, first, a little bit about my client, the American Tobacco Company. At one time American was a thriving and successful tobacco company, but as competition increased, it eventually lost its market share. And by the 1990s, American had a very small portion of the market. And Brown & Williamson Tobacco Corporation bought the brands that American Tobacco had, and American Tobacco no longer exists.

And you may hear the name Brown & Williamson from time to time in this case. In fact, you will probably hear a couple of witnesses from Brown & Williamson who will testify on behalf of American Tobacco Company. And that's because since American no longer exists, there's no employees to come in here and testify.

But it is important to understand that

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Brown & Williamson is not a party to this lawsuit. During the time frame of this lawsuit, 1950 to 1965, American and Brown & Williamson were competitors. They were separate and distinct companies, and they were vigorous competitors with each other in the marketplace.

I want to now talk to you about some of the things that Mr. Smith said in his opening. And you heard Mr. Smith start his assault on the tobacco companies. And he's going to do this for one reason: He wants to -- everyone to forget what this case is about. And to repeat what Mr. Cofer said, the case is about whether Mr. Tompkin's smoking caused his lung cancer after he had stopped smoking for 27 years. And if it did, whether he was aware of the risks of smoking and chose to accept those risks.

And keep that number in mind, 27 years. That's a long, long time, as you heard.

Mr. Smith has made allegations. You will hear more allegations. I would ask you to be patient, reserve judgment through his case, because in the words of Paul Harvey, when the defendant puts on our case, you will hear the rest of the story.

I want to now turn to documents. Mr. Smith has told you supposedly -- and he'll tell you more -- about what the tobacco companies did 50, 60, maybe even 70 years

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ago, and he's going to show you documents from the tobacco companies. And he's going to cherry pick documents and pick out excerpts and read to you what he thinks are the most sensational excerpts. And he's going to quote

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documents and argue that they reflect what a company like American Tobacco Company thought or did in the 1950s. And some of these quotes may be taken out of context, so reserve judgment until all the documents are in.

And let me give you an example of what I'm talking about. Mr. Smith actually put up on the board an article by Graham and Singer called "Successful removal of an entire lung for carcinoma of the bronchus." And it's on his time line as an article that shows that smoking caused lung cancer.

Ladies and gentlemen of the jury, you can read this entire article, and the word "Smoking" is not mentioned one time; not once.

So these are the kind of things that we need to be aware of as we go through the trial.

The other problem we have in a case like this is many of these documents are so old, that the authors have passed away or are not in good physical condition, so we can't ask them "Why did you say this? What did you mean when you said this?"

They can't come into court and explain the

context of what they were talking about. So that's not available to us.

And let's be honest, and let's just be candid, ladies and gentlemen, some of these documents, you are going to hear about I'm sure, they are just plain stupid. They are dumb. And people say stupid things and they've said dumb things.

And there's no getting around it. And we are not going to defend it.

But, remember, the dumb ideas are usually recognized as dumb ideas. No organization, no matter how big or small, wants dumb ideas. And the tobacco companies have been in existence for a hundred years. They have had thousands of employees who have said things and done things.

What counts is not what you find excerpted in a document that might have been said by one tobacco company. What counts is action: What was actually done, what was actually accomplished by the tobacco companies, what was accomplished by this industry over this period of time.

And remember, as we all know, actions speak louder than words. And, ladies and gentlemen, action there was, and it was positive.

But in order to judge these companies, as

Mr. Cofer said, you know, hindsight is wonderful. We can sit back and second guess the football game the next day and that's one thing. But now we are second guessing what happened 50, 60 years ago. And to do this, we literally have to put ourselves in a time capsule and go back 50 years.

And I don't think, besides maybe Mr. Smith and myself, there were too many people around in the fifties, but so the rest of you, we will take you back. I think one -- somebody else. I apologize.

And we are going to take you back into the 1950s, so that you can see the context and see what was going on. And Mr. Cofer showed you some of the articles that people were reading in the fifties.

And if you like nostalgia, you are going to

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love seeing some of these old "Life" magazines and "Look" magazines that Mr. Cofer is going to show you.

I want to talk to you, also, about what went on in this case in product development, 1950 to 1965.

And this is the relevant time period that Mr. Tompkin made his conscious decision to smoke.

Mr. Smith will have you believe that the companies did nothing; they hid their head in the sand and they ignored the health concerns.

Ladies and gentlemen, in this case you are

going to hear about the incredible progress made during this period of time by the tobacco companies in researching issues relative to smoking and health.

You will hear of the product improvements that were made in response to the health concerns. You are going to hear about something called "The working hypothesis." Now, you heard Mr. McLaughlin talk about hypothesis and speculation.

But there was a working hypothesis, and it consisted of three parts. The first part is that the manufacturers did not believe their products to be injurious to the health in the 1950s. Well, you may say, well, you saw Mr. Smith's time line and I'm going to show you another time line in a moment. But despite this belief that their products were not injurious to the health, they operated on the assumption they were wrong. They said "Let's assume our products are injurious to the health," and they took immediate action to develop safer cigarettes.

At this time they utilized all technology available and developed many new technologies as part of this effort during the fifties, early sixties.

And as a result of American and other companies adopting a working hypothesis, the time period between 1950 and '65 was a time of great change in the design of cigarettes.

American reacted to the public health controversy. It set out to reduce tar by reducing the smoke inside.

You'll see in this case some of these innovations. And you'll see this right here, looks like a rag. What it is, it's cellulose acetate. What they did with this, they rolled it into filter rods which were cut off and put into cigarettes.

You see in 1952, the acetate filter was developed. Today we take filtered cigarettes for granted. The great majority of people that smoke, smoke filtered cigarettes. But in 1952, going back in our time capsule, that was a significant innovation.

Let me get my -- you'll see tobacco; flue tobacco, Burley tobacco. Then you'll also see what we call tobacco stems. These were incorporated into tobacco. Natural ingredients from the tobacco, and that was incorporated, I believe it says, 1954.

Then we have reconstituted tobacco. It means the tobacco remains, the manufacturing process, were reconstituted and put back into the cigarette.

And what did all this do? What was the significance of these innovations?

The significance of these innovations was that back in the 1950s, and even today, no one really knew

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what specific chemical in smoke causes the disease. And in light of that, public health officials like Dr. Wynder who you heard Mr. Smith talk about said "Reduce it all. Reduce the smoke, reduce the intake that people are taking in."

And that's precisely what American and the other defendants did in this time period.

And the bottom line is that these innovations helped reduce the tar produced by burning the cigarettes so much so that by 1960, tar had been reduced by 30%. That was a significant innovation.

And in 1964, Carlton was introduced as an ultra low-tar cigarette. The companies did this quicker and better than Dr. Wynder and anyone else had any -- could have or did expect.

And all of this was as a result of the companies working on this working hypothesis to make innovations to remove tar.

Let me turn now -- and Mr. Cofer covered a little bit of this and I'll be brief -- but Mr. Smith mentioned it, and I want to talk about this scientific debate that went on during this period of time.

Ladies and gentlemen, so there is no misunderstanding, and I don't want any misunderstanding on this issue, smoking causes lung cancer. We know that now. But in the 1950s and early 1960s, and again we are back in

our time capsule, we are going back to that period of time to put ourselves in position to see what the experts were saying, during this period of time, despite what Mr. Smith told you, there was no scientific consensus as to whether smoking actually caused cancer.

The controversy existed among the scientific community, among scientists with absolutely no stake in the matter, with no connection to the tobacco companies.

He showed you a time line with some studies prior to 1950, but let's look at this chart. This is a chart of experts and researchers and doctors with the National Cancer Institute in the early 1950s. They are questioning smoking as the cause of lung cancer.

And I'm not going to read all those quotes to you. You'll hear about them in this case. But these aren't tobacco company executives saying this. This is the National Cancer Institute questioning in the 1950s whether smoking causes lung cancer.

Next chart, Mike.

Next, I'm going to show you a chart, and I'm not going to go over all these quotes, but these are eminent scientists and organizations, American College of Chest Physicians, the American Cancer Society, but I want to show you particularly the second quote from the bottom.

Dr. Mayo in 1958, head of the Mayo Clinic,

and when he said "I just don't believe smoking causes lung cancer." I hope I read it right.

But this is Dr. Mayo. This is not a tobacco executive. This is Dr. Mayo.

Now, Mr. Smith showed you all this stuff in the forties. This is the head of the Mayo Clinic and other researchers questioning whether smoking caused cancer.

1954, the Surgeon General of the United States, Dr. Sheeley, and here's what he said, and I'm going to have to get up here and read it, "Although cancer of the lung appears to be a greater risk in heavy cigarette

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smokers than in nonsmokers, that is not to say smoking causes lung cancer."

Ladies and gentlemen, I want to show you another chart, and this chart will make two points to you. Excuse me, I'm going to have to move in front of you to explain this.

Above this time line you see articles. And I'm not going to go over all these articles, but you can see them.

This is the scientific debate. These are representative articles going on in the scientific journals, or they were reported on. All of these questioned the premise that smoking caused lung cancer.

Below the time line is what we call the

common knowledge. This is the mainstream media. This is what people like Mr. Tompkin and people in Akron, Ohio were reading during this period of time. And you saw some of the articles cited by Mr. Cofer, and it's interesting in 1954 we have articles from "Newsweek," "U.S. News and World Report," "The Akron Beacon Journal," "The Cleveland Plain Dealer," and you'll see this, all using the headlines "Cancer linked to smoking."

And what's interesting about this chart, if you look at this period of time, you see this enormous amount of publicity on the scientific debate. In 1952, '53, '54, '55, '56, '57, '58 and '59, this is a period of time, ladies and gentlemen, that Mr. Tompkin was smoking between three and ten cigarettes a day. He was a very light smoker.

Leave that, Mike.

This smoking debate, this scientific controversy, generated an enormous amount of publicity, as you can see, during this period of time. There is no question that there was a split in beliefs about the -- regarding smoking and lung cancer. Some scientists believed smoking caused lung cancer. Some believed it had not been proven. Some members of the public believed smoking caused lung cancer. Some did not.

In fact, ladies and gentlemen, it's probable

that some people in the tobacco industry believed smoking caused lung cancer, while most did not.

So while there was a split of opinion on every level, one thing is very clear: The public was aware that smoking had been linked to cancer, and unquestionably believed it posed a threat to the smoker's health.

This scientific debate generated this massive media publicity that you see on that chart, and the mainstream media, the newspaper, "Time," "Newsweek," "Life" that everybody was reading, they had already decided. They had said there was a link between smoking and lung cancer.

The bottom line is that there was a link between smoking and lung cancer, and that link was well-known to the general public.

The scientific controversy that existed on that chart made the link between smoking and lung cancer even more widely known by the public.

I now want to turn to another topic. I want to talk about research funded by the American Tobacco Company.

And you heard Mr. Smith talk about the American Tobacco Company in his opening.

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The plaintiffs will suggest to you that in light of this debate, American and the other tobacco companies simply did nothing in terms of smoking and health

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research. And the evidence will show nothing could be further from the truth.

American and the other companies worked diligently at the forefront of research on the smoking and health issues.

They didn't stick their head in the sand and ignore the issues like Mr. Smith would have you believe.

This chart shows funding by the American Tobacco Company, independent funding starting in 1936 at the Medical College of Virginia. And this was truly independent research.

This research was responsible for numerous, numerous peer-reviewed journals. The work was done solely and independently by scientists at the Medical College. They were free, whatever the outcome of their research, to publish it, no strings attached. And publish it they did. As I said, numerous peer-review journals, eight books on biological research and books by Larson, Haag and Silvette. And you are going to hear that name again through this trial. Larson, Haag and Silvette.

And what they did, they came up and during this time period, 1961, they came up with this thing I call the green monster. And the reason we call it a green monster is because it's heavy, it's very heavy and it's called "Tobacco, an environmental clinical study."

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And what do we do with this book? How important is this book? Did they just sit on a bookshelf someplace and nobody pay any attention to it? Well, you can see by the book, it's falling apart, I have it held together by a rubberband and Scotch tape. So these books got a lot of use.

And one of the areas they were used, and you heard Mr. Cofer talk about the Surgeon General report in 1964, and what the Surgeon General report said about the green monster, this is the Surgeon General saying "The annotated monograph by Larson, Haag and Silvette, compiled from more than 6,000 articles published in some 1200 journals, was available as a basic reference source."

This was in the 1964 Surgeon General report that said smoking caused cancer.

Ladies and gentlemen, this isn't me telling you this. This is not some paid expert telling you this. This is the Surgeon General of the United States telling you this.

And keep that statement from the Surgeon General in mind during this trial. That the Surgeon General of the United States, he concluded that smoking causes cancer, lung cancer, in 1964, and he made that finding based upon published research funded by the American Tobacco Company and other defendants in this case.

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Ladies and gentlemen of the jury, this is not hiding research. It's not burying our head in the sand like plaintiff would have you believe.

This is not ignoring the health issue. I submit this is responsible corporate conduct.

THE COURT: Now, you are into final argument. Let's --

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MR. MILLIMAN: Okay, Your Honor.
THE COURT: Slow it down a little bit.
MR. MILLIMAN: All right. The evidence is going to show in this case that funding of independent research, and it will show that American and the other tobacco companies were willing to live with whatever the results might be.
Ladies and gentlemen, I am now going to conclude. And let me leave you with this in conclusion. You may not like tobacco companies. A lot of people don't. And you may hate smoking. A lot of people do.
But I'm going to ask you to please focus on what this case is all about, and that's Mr. Tompkin's choice to smoke cigarettes and whether cigarettes caused his lung cancer.
And I want you -- I want you to remember just a few key facts. I'm sorry, Russ.
MR. SMITH: That's all right.

MR. MILLIMAN: Can you all see that?
Okay. I want you to remember a few key facts on all of the rhetoric and all of the documents that you are going to hear.
That for nine years, Mr. Tompkin smoked three to ten cigarettes a day. Three to ten cigarettes a day for nine of his 15 years. Never more than two and a half to three packs a day. And again, 27 years that he did not smoke before he was -- before he was diagnosed with lung cancer; thirty years before he died. Remember that, 27 years.
He had a heavy exposure to asbestos. Forty years had elapsed since his first significant exposure to asbestos as a bricklayer. You are going to hear evidence that asbestos in the lungs, in the amount sufficient to cause asbestosis, can cause cancer. And you are going to hear that Mr. Tompkin had that level of asbestos in his lungs.
These are the simple facts. There's nothing complicated about this.
And at the end of the day, you heard Mr. McLaughlin talk about epidemiology. You heard him talk about relative risks. And what this means is, we can display it, I'm not a great artist but I'll try to display it here, relative risk of one is the baseline. This is the

risk that a never smoker has of contracting cancer.
And you will see the epidemiology will show that when you are smoking, your relative risk is up here, it's elevated. And as the cessation continues, after you have stopped smoking, it goes down almost to the point where it becomes the same risk as one who has never smoked.
That is what the epidemiology will show. It's down under 2, between 1 and 2, but it is almost at the same level of risk.
And should there be any doubt about that, remember what Mr. Cofer told you in his opening about Dr. Allan Feingold, what he tells his patients. After ten years, your risk is the same as a never smoker.
But we also know that when you have a significant asbestos exposure like Mr. Tompkin did, the risk goes up so that after 40 years have elapsed since the initial exposure, you have an asbestos exposure of almost six, compared to about one to 1.5.

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What does this mean? It simply means that he had a four to 600% higher chance of contracting cancer from asbestos than he did from smoking.

This is the epidemiological evidence. And, ladies and gentlemen, in conclusion, what it all means, and when you go back to what Mr. Cofer said, it was too little, too long ago, for it to be from cigarettes.

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Ladies and gentlemen, that concludes my part of the opening. We are now going to get to hear some testimony finally, and I appreciate your patience in sitting through these openings.

And again from all the defendants, we want to thank you for taking your time to come in and hear this important case.

Thank you.

THE COURT: We will take about a ten-minute break. You may file out.

Counsel, please remain.

(Jury out).

MR. PROCTOR: Your Honor, the motion deals with what we think will be Dr. Blum's testimony concerning --

THE COURT: I've already ruled on his testimony. Don't I have an opinion out on Blum testimony?

MR. PROCTOR: Not on this specific -- it is not --

THE COURT: I have an opinion, don't I?

MR. McLAUGHLIN: Yes.

MR. PROCTOR: Absolutely, Your Honor.

THE COURT: Was this raised in your prior motion that I ruled on?

MR. PROCTOR: Your Honor's prior motion

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limited Dr. Blum to duty to warn.

THE COURT: Was the issue raised in the motion earlier?

MR. PROCTOR: Not specifically, Your Honor.

THE COURT: Then why is it being raised now?

MR. PROCTOR: Because we don't feel that it's relevant to the area of his relevant testimony.

THE COURT: Wait a minute.

Weren't we supposed to go through this long before I started trial? I've spent days on this issue, and now you want to tell me as this witness is approaching, you have even more complaints about his testimony, right?

MR. PROCTOR: Your Honor --

THE COURT: They are overruled.

MR. PROCTOR: Thank you, Your Honor.

THE COURT: There is no way I can run this courtroom if you are going to keep going back over the same issues. I'm just not going to go through it.

Are you ready -- you've now got five minutes for your break.

MR. SMITH: At this point in time have they waived the TI issue? They put the evidence in front of the jury.

THE COURT: I haven't heard any waiver.

(Recess taken)

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THE COURT: Please be seated.

Please call your first witness.

Please call your first witness.

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MR. SMITH: Dr. Blum, your Honor.

ALAN BLUM

called as a witness by and on behalf of the Plaintiff, being first duly sworn, was examined and testified as follows:

THE COURT: Please be seated.

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DIRECT EXAMINATION

BY MR. SMITH:

Q Will you state your name please, sir?
A My name is Alan Blum.
Q Your occupation, please?
A I'm a family physician and a professor of family medicine and an endowed chair at the University of Alabama School of Medicine, Tuscaloosa branch.
Q Your address, please, sir?
A I live at DELETED.
Q And your business address? You live there too don't you?
A Seems that way. My office is at on University in University Drive East, Tuscaloosa, Alabama, 700 University Drive East.

Q I should just pause. You work a lot of long hours, is that right Dr. Blum?
A Yes.
Q And that's what I was referring to.

Would you tell us a little bit about the kind of work that you do, Dr. Blum?

A I am a family physician in my livelihood in the sense that I work in an academic environment and I teach medical students and physicians in training. And that means I supervise them in seeing patients. I take care of patients myself so they can watch me. And I also get to give lectures. And also I'm invited to other schools and conferences to speak. And I also do research and try to publish in medical journals.
Q Dr. Blum, you are familiar with the topic of tobacco and smoking, is that correct, sir?
A Yes, sir.
Q Would you tell us a little bit about when you first became aware of that topic?
A I was a 8 year old boy watching baseball games with my father in New York -- I was from New York and he was a Dodger fan, Brooklyn Dodgers -- and he made a comment to me that dealt with the fact that he was very upset that as late as 1956, when I was 8, that the Dodgers could still have a tobacco sponsor, Lucky Strike. And he was very upset in

watching the games with me that this still could be going on.

He said why don't you tape record these commercials. We had a big old tape recorder and started saving the magazine ads that have the baseball players in or yearbook. And one day, I predict it won't even be that long, that no one will believe that the cigarette companies could have gotten away with associating cigarettes with sporting events.

And that was the initial inspiration that has gotten me on what has been a 40 year effort to collect and keep and try to make some sense out of cigarette advertising, promotion. Meaning, if you go to a game or go to an event and they hand out things. And I really devoted

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that to my area of professional interest as well. I'm invited to speak to other schools and other medical societies about.

Q For baseball nostalgia, who were some of the ball players of the Dodgers? This was in '56?

A '56.

Q They were a good ball club then?

A '55 they got their first flag first world championship. It wasn't just the Dodgers, every team, each major league team had, if you go to the game you get a score card or see the billboards. If you went to the Cincinnati

Reds you would see one of many different kinds of cigarette ads. Philip Morris was one that prominently advertised on scoreboards.

THE COURT: You are way ahead of the question. The question was, who were the Dodgers players.

THE WITNESS: You want me to go around the team?

THE COURT: I want you to stick with the question, if he asks you who the Dodgers players were don't give me the life history of somebody else.

BY MR. SMITH:

Q Some of the Dodgers advertised in cigarettes?

A Jackie Robinson advertised in cigarettes, that would be one that we would all remember.

Willie Mays was a Giant, he was also advertising the Happy Felton's Knot Hole Gang, was the name of the show we were watching at the time.

Q Tell me about that Happy Felton's?

A This was a program for kids that went on before the actual game. And the little leaguers would be picked to hit, throw and field. And one of the baseball players like Jackie would be out there and doing this picking one of the three kids to be a winner. But the funniest thing was they had this in front of a Lucky Strike billboard. So I was able to get a tape of a Happy Felton's Knot Hole Gang

illustrating that kind of thing.

So that would be an example of what my father told me about this.

Q What else did you do while you were in high school in that regard?

A As I moved on into high school I became editor of my high school newspaper. And when the report of the United States Surgeon General came out in 1964, which had been empaneled under the Kennedy administration to study and give a conclusion as to the waging war over smoking and cancer, I wrote an editorial in my high school newspaper about that and a very anti-smoking editorial.

That was my first written article on the subject.

Q And this was the 1964 Attorney General's report, was it?

A The Surgeon General's report of 1964.

Q Or the Surgeon General's report, rather.

And was that followed by the warnings that the Surgeon Generals required in 1966?

A Yes, sir. As a result of the Surgeon General's report, very soon after that hearings were held, and it was the decision to place congressionally mandated warning labels on cigarette packs and cigarette advertisements.

Q Did you continue or withdraw that, please.

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After graduating from high school, Dr. Blum, what did you next do?
A Do? In terms of going to college?
Q Yes, sir?
A I was an English major in college and pre-med major and I kept collecting advertisements of cigarette ads, but I was trying to study and pass.
Q And you did well in school and with English, is my understanding?
A Yeah, I got by. I learned how to be an editor and that helped me later on when I became an editor of medical journals.
Q You graduated from medical school when?
A Emory University School of Medicine in 1975.
Q And what did you then do?
A I searched an internship in internal medicine and continued as a residency, it's another 2 years, in family medicine. And I did a fellowship, teaching fellowship in family medicine for one year, and went to the Journal of the American Medical Association to serve as a fellow in medical editing.
Q At the?
A Journal of the American Medical Association.
Q That's in what year?
A That would have been in 1979, 1980. It was a

Nationally advertised fellowship in which they accepted one or two people a year. It was a competitive fellowship.
Q And you became Board Certified in family practice?
A I had been Board Certified in family medicine. When you finish a residency training program you opt to take an examination which enables you to qualify to put your initials out as a member of the American Board of Family Practice. And I did that.
We were the first specialty board. We had to renew for the six or seven years, and last year I did my first renewal of that.
Q And as far as technicalities, you are licensed to practice medicine at this time?
A Yes, sir.
Q You are married and have children?
A Yes, sir, I have three boys.
Q Would you tell us a little bit about the editing procedure for medical journals? What happens, how do articles wind up?
A I just want to add, I'll be married 26 years tomorrow. If I said I had children and wasn't married I didn't want to leave you with that.
Q Your wife won't appreciate that?
A I had to do that.
What was the --

Q What happens, what's the protocol, what's the procedure for a medical article to pass peer review and wind up in a peer review journal?
A I learned to become a member of an editorial staff and you apprentice yourself in a journal. This is probably the smallest of all medical specialties. There are very few physicians earn their living sitting in and an office reviewing manuscripts. There was at the time I was doing this about 12 of us around the world doing full time medical editing.

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So an author or group of researchers submit a manuscript on an article they have written or done research in the laboratory with animals or worked in clinic or hospitals with human beings. And there are various kinds of studies that are done. And these come to the journal and they are then given an initial reading by the in house editorial staff. And then if merited beyond initial reading, are sent out to what are known as peer reviewers. These individuals have been recognized for their own contributions in the field. And then they then send back a review.

Usually on the Journal of the American Medical Association there would be about three peer reviewers. And they then, the editorial staff, would get a recommendation from the editor supervising that particular manuscript.

And that editor would either say, well, I don't think it should be published, or based on reviews I think it should be, but it would still go to the editorial staff. So it's a many layered process to get an article published in the peer review of the major medical journals.

Q And did you become involved with the medical journal of Australia?

A Yes. After completing my fellowship in medical journalism at the Journal of the American Medical Association, I saw a classified advertisement in the New England Journal of Medicine for editor, Medical Journal of Australia.

And being young and foolish, I sat down 12 hours later, sent in my application, and I received a call a couple of weeks later from Sir Keith Jones. And I didn't know how to respond, whether to call him sir, or Keith or Mr. Jones, whatever. And he was saying, I think we are very interested in having you as editor of the Medical Journal of Australia.

And we had an interview process where I was interviewed by several members of their publishing team and physician, and selected from among the applicants for that, and moved to Australia to become the editor of the 'Medical Journal of Australia.

Q And you held that post from when to when?

A Roughly it crossed over years and it was from 1980, the end of 1982 when I was awarded the post to the beginning of 19 -- let's see, 1981 to the beginning of 1983.

Q While you were there, did you have -- were you to take part in any publications involving tobacco?

A Yes, sir.

Q Would you tell us about it, please?

A We produced -- this was a for the nightly journal. This came out every other week, and it was the medical journal of the entire country, so it garnered a lot of attention the day it came out.

There were medical and science reporters assigned to the medical beat, and they would pick an article or two or three.

In the case of the theme issue that we did on smoking, this became extremely well publicized in Australia; to the point where it was the first and only edition of that journal ever to go into a second printing.

Q And there were a lot of material covered involving tobacco in that issue, is my understanding?

A Yes, it was my first effort to do a theme issue on

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that subject, because I had not found any other medical journal in the world that had ever done an entire issue cover to cover, as of 1982 when I was editor, on that subject.

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Q And that's what occurred in this particular publication?
A It was my first effort at that.
Q At that, after you left the Medical Journal of Australia, where did you then go, sir?
A I had been invited to edit the State Journal of Medicine in New York, which was sort after discovery of an old journal that hadn't been heard of for a long time. I turned it down initially, but I'm from New York and relatives were there. And we had a young baby and we felt, after he nearly choked on a piece of carrot, that it would be a lot better to be closer to home. And I left the New York State Medical Journal of Australia to become the editor of New York State Journal of Medicine in New York.
Q And did you have occasion to have publications regarding tobacco go into that journal while you were the editor?
A I was the editor for three years. And during that time I published, out of the 30 plus issues that I edited, two theme issues on tobacco. These were the first theme issues in the United States ever on smoking.
Q So you published the first theme issue ever to occur in Australia, and also the first two that occurred in the United States. You were the editor of those journals when that happened?

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A And I brought them here.
Q Can you show them to us?
A This was the issue of December, 1983, New York State Journal of Medicine, the World Cigarette Pandemic. And this involved approximately 60 articles from all over the world based on authors that I had contacted and medical societies that I had written to.

And it dealt with issues such as the filter. It dealt with spitting tobacco. It dealt with a lot of advertising issues of cigarettes. And all of the illustrations that were used in this publication came from my own collection.

And we followed up, because the Medical Society passed a resolution of commendation, because it was the first time in 87 years the journal had ever hit the news.

They were very encouraging, and we did a follow up issue in July of 1985 which was even bigger. And it was the World Cigarette Pandemic Part 2. And this dealt more with minorities, with issues of research, and how research is conducted by the tobacco industry. And also promotions all over the world, not just in the United States, but focusing primarily on the United States.

Q Dr. Blum, have you had occasion to examine medical and scientific literature insofar as it pertains to the use of cigarettes and causing lung cancer?

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A Yes, sir, I have. I have examined the medical literature in relation to smoking, as far back as I can possibly trace it. And that puts us back more than a century into the 19th century, but primarily I focused on the 20th century.
Q Would you tell us of some of the articles that you

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have come across that you believe are relevant to this situation?
A Yes, I think in the time line that.
Q Maybe I can set that up with the court's permission.
A This should be easier to follow than it looks. I always am sensitive to trying to make heads or tails out of when there is a lot of fine print in any type of graph or time line.

So I was asked by Mr. Smith to provide examples of articles that, in my opinion, indicated what I had found about the nature of the relationship between smoking and lung cancer.

And that the earliest date you see is 1920, but in reality there are references predating that. But to fill them all up and to cite every reference, I think, would not be readable and would not be fair because I think it would indicate that they were of equal import.

The ones that were chosen, some of the names of which -- I don't speak German so I can't pronounce -- were

chosen because they made a contribution that, in my opinion, solidified the case that smoking caused lung cancer. In and of themselves, up until a certain year that might not have been the case; but when you add them up they did.

So the earliest reference, although it's Fahr, F-a-h-r, on the far left from Germany and Tylecote, T-y-l-e-c-o-t-e from Great Britain in 1927, while very, very important, are rather obscure and were not always available or always cited in this context of deciding the issue of smoking and lung cancer.

So the first issue, even though it's on top of the other three that I just mentioned, Lombard and Doering, 1928, is the first article that I would consider extremely important as we begin to build that case about smoking and lung cancer.

1928, the New England Journal of Medicine, this is one of the handful of journals that are published frequently and are agreed to be above reproach in terms of their peer review process and the excellence of the material that they publish. Lombard and Doering published an investigation of the habits of people with cancer.

And they wanted to see whether those who had cancer differed in any way from those in the community, in the same community, who didn't have cancer. And they

found, I can refer -- I brought a book with these studies in there -- see if I can remember.

They found in looking at both groups a 27 percent higher rate of cancers in the group that they called heavy smokers. They were referring primarily to pipe and cigar smoking at that time. And they are referring primarily to cancers of what they call the buccal mucosa inside the mouth. The cheek is called the buccal; it is the adjective of whatever Latin is for cheek. And they left in their conclusion the important conclusion that smoking, what was called heavy smoking, was related to cancer.

It is, without question, the first statistical study in which authors who used the statistics from, at that time, the leading statistician, the physician Dr. Hoffman, [sp] who had collected all the of these data and their analysis, which also looked at things like where they

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were born? Were they married or unmarried? What part of town did they live in? Did they live next to an electrical current? Because at this time people were concerned about electricity. Did they have exposure to the flu in 1918? Because some people were suggesting that lung cancer might have been caused by the flu epidemic. Had they been in the war exposed to war gas? They had poison gas in World War I. And they went down a long list and went down about 20

different factors and dietary things.

And they found, above all, tobacco use was the factor that distinguished from all others those with cancer and those that did not have cancer.

One builds on a study like that. And not long after that, Lichint, L-I-C-H-I-N-T, in 1929 in Germany.

MR. PROCTOR: Your Honor, I object to not proceeding in the question and answer format with this witness.

THE COURT: Objection sustained. Question and answer is the way we do it, not just a lecture.

THE WITNESS: Thank you.

BY MR. SMITH:

Q If you would continue with the Lichint for 1929, please?

A Lichint published in Germany a review of the literature on lung cancer. And he, too, as did Lombard and Doering, looked at all of the suggestive factors that could be implicated in lung cancer. Tuberculosis, syphilis, almost anything you can think of was being proposed as a cause of lung cancer.

Why lung cancer? Well, out of the blue, a disease that had almost been a museum piece at the turn of century, a disease so rare that one of the scientists who is the author of a subsequent study, Dr. Ochsner, when he

was a medical student in 1919 was told he would never see a another case again. And yet, by the 1920s, the world literature was numbering in the thousands of cases. And in the United States, by 1930, we had over 3,000 cases reported.

You report a case by doing or taking a biopsy and looking at it under a microscope. When it looks and is proven to be cancer then that is recorded statistically.

Q Does that pretty well cover the Lichint?

A Lichint found in his review of the literature that, as early as 1900, researchers were painting the juices, they called it, from tobacco smoke, they would liquefy it and paint it on rabbits or mouse's backs and they would induce what could be called tumors.

They called it epithelial overgrowth, which meant it looked pretty ugly. And they cut it and looked at it up under the microscope and they would be called tumors or growth of some sort.

And we found in 1913 this was duplicated by German researchers called Wacker and Schmicke, W-a-c-k-e-r-s-c-h-m-i-c-k-e, I believe.

And so to summarize, by 1930, there were at least 167 reports, as cited by Lichint, in the world literature dealing with smoking and lung cancer. 167 different articles were cited by him. Plus in the American

literature, Lombard and Doering was talking about it.

MR. PROCTOR: Your Honor, same objection as

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before.
THE COURT: Counsel, you are going to have to control your witness, please.
BY MR. SMITH:
Q If you would take us, please, to the Lombard and Doering.
A I was just going to add Lombard and Doering.
THE COURT: Just ask him a question. This doesn't take you there. Ask him a question.
BY MR. SMITH:
Q Dr. Blum, would you please tell us, with respect to the Lombard and Doering paper that you have spoken of earlier, it did deal with tobacco and --
THE COURT: What are its teachings? Simple question, what are its teachings?
THE WITNESS: May I answer?
THE COURT: Yes.
THE WITNESS: The teaching of Lombard and Doering, in my opinion, was that those who smoked tobacco had a greater risk by 27 percent, that's about a fifth grade or 20 over a hundred, 30 percent, 27, 30 percent greater than those who did not smoke. That's the initial report in the United States.

THE COURT: Risk of what?
THE WITNESS: Of cancer.
THE COURT: All right.
THE WITNESS: That's the initial report in the United States that is cited for evidence that smoking and cancer are related.
BY MR. SMITH:
Q And that's in what year?
A 1928 New England Journal of Medicine.
Q What is the next article or report you studied, please?
A In 1930, so important was the Lichint article in the German literature in 1929, that it was summarized in a special review of the world literature in the Journal of the American Medical Association. And this was a testimony to this review by Lichint in the German literature.
So this then was taken to all of the readership of the Journal of the American Medical Association in 1930.
Q And did it teach anything different than had occurred in the Lichint?
A It translated Lichint into English.
Q It was for teaching for us?
A Yes. And it also gave us an ability to review those citations, that is the references going back to 1900, 1911, 1913, and all of the other case reports dealing with smoking

and lung cancer, as opposed to poison gas and lung cancer, tuberculosis and lung cancer, syphilis and lung cancer. It's distinguished smoking as the major cause for the explanation, the major explanation for the increase of lung cancer that we were seeing in the early part of the 20th century.
Q And, Dr. Blum, would you tell us of the next article, please, that you reviewed?
A Well, in deference to his Honor, I don't know as every article would be necessary to go over in the same detail.
Q No, I'm not asking you to -- we'll touch on them one at a time on the articles?
A For me, in the review, the article by McNally. And if

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I could refer to find exactly where it was published.
Q Yes, absolutely.
The article by McNally?
A The article by McNally, which was funded in part by the American Medical Association, was entitled the Tar in Cigarette Smoke and Its Possible Effects. Not only did McNally summarize in the Department of Medicine at Rush Medical College in Chicago, not only did he summarize the world literature on smoking and lung cancer, but he then duplicated the studies that had been done in 1900, 1911, 1913 to try to identify the components of what was called tar.

Tar is probably the single most important word.
Q Why do you say that?
A Excuse me?
Q Why do you say that, Dr. Blum?
A Tar, in my opinion, is the single most important word in referring to the entire issue of smoking and lung cancer.
Q Why is that, doctor?
A People make decisions and have always made decisions since that word was utilized on purchasing brands that were lower in tar. And the tar is, in effect, a composition of a totality, a group of chemicals that can be separated out from the soup that tobacco smoke when liquified, when made into a liquid condensed, if you will, like a tea kettle will condense on a glass. And you take that watery stuff and identify each chemical; that's what he did. McNally identified many of the chemicals that were found in the tobacco smoke by doing that.
Q The next article -- or do you have more on McNally?
A If I could just add also, he elucidated that or thermal properties of tobacco smoke that were the heat, then there was the mechanical, or what we would call, what he called irritative, and they were the chemical.
So there were three different properties that he was alleging could be implicated as a possible causer of cancer. Mechanical, heat irritation, chemical irritation,

and the -- well, mechanical can be divided up into irritative and thermal or heat and thermal. And then the chemical were also irritative.
So then he was providing not only the names of some of the chemicals, including nicotine, that he could separate out, but also the mechanism by which these various chemicals could possibly cause harm. There is a long list of them. Some of them are gass, like ammonia.
MR. PROCTOR: Your Honor, same objection as before.
THE COURT: Well, he's still continuing with his testimony.
BY MR. SMITH:
Q Would you continue with what that teaches us insofar as your explaining some of the components, please?
A I apologize and I'll try to be more precise.
The list of chemicals McNally found included cyanide, ammonia, acrylic aldehyde and Formaldehyde and many others. There are at least a dozen others listed; arsenic, nitrates, carbonates.
Q Are there other teachings from the McNally article that you would like to discuss today with us or mention to us?
A I think that, that --

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Q Pretty well covers it?

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A Basically what covers this particular thing. He also tried to explain why in those mice studies that the tar, the tobacco juice was able to induce these tumors.
Q And that -- was that a significant statement on his part?
A In my opinion, it was a revelation to read that in 1932, drawing on literature as early as 1900, an individual was saying we have a problem here and we can identify in tobacco smoke at least a dozen chemicals that may be implicated in the causation of cancer.
Q The next article that you considered, Dr. Blum?
A The next article listed on the time line is that of Graham. He is cited for one reason, he scoffed later on when Dr. Ochsner in 1939 hypothesized that smoking was the major cause of lung cancer.

Graham, who was universally considered the leading chest surgeon of the time and the first to operate on a patient to remove a lung, as reported in 1933, opened up his article. And if I could read, in the Journal of the American Medical Association, this an individual who smoked himself and who discovered six years later, at the notion that smoking could cause lung cancer, opened up his own article by saying, carcinoma or cancer of the bronchus, of the tubes leading to the lung, in recent years has become a problem of major importance.

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I think it's important to cite that because we were dealing with what, the universally regarded leading chest surgeon of the day. Someone who opposed the theory, opposed the research that said smoking caused lung cancer, still acknowledged that we were getting to have a major, a problem of major importance. That meant numbers, lots of people.
Q And the next article that you reviewed, the next paper, please?
A Well, the next group of three papers, to my mind, are the most important of the 20th century, insofar as smoking and lung cancer is concerned.

The three papers are by Dr. Alton Ochsner, a chest physician at Tulane University. Soon, and by that time, by 1941 to establish the Ochsner Clinic, named by his colleagues in his honor. And his colleague, his junior colleague, Dr. Michael DeBakey, who now is the professor emeritus and chancellor of Baylor College of Medicine, where I taught for 12 and a half years. And I think that these are -- if I might add.
Q Yes, I wish you would.
A These are the most important articles of the 20th century in that regard.
Q Why is that?
A In 1929 Ochsner and DeBakey published an article in

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the Journal of the American Medical Association citing smoking as the cause of lung cancer.

They included, if I am not mistaken, approximately nine of their own cases, but I forget how many in total, and they described their finding by saying as early as 1936, remembering, as Ochsner did, that he would say he would never see another case of lung cancer. Had seen nine cases in a period of just six months between December of 35 and June of 36, and he said in his article

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that he had the temerity, the courage, if you would, to publicly state that smoking was the major cause of lung cancer. This is 1936.

The courage, the temerity he said, because at that time over two-thirds of physicians smoked. More than that in the general population smoked. It was extremely popular, it was on each night on sponsoring one or another radio shows. It was as common a thing to do as chewing gum or having breakfast.

So to propose this in 1939 through that article was an important specific allegation made in the American medical literature.

Q The other two you mentioned, they were the three most important. The other thing you wish to say?

A In 1941 he published, in the New Orleans Medical Journal, about a paper in progress; and that is the 1941

paper listed above that was the first true review of the world literature on smoking and lung cancer.

401 references were cited in this article. It is a mammoth achievement for two individuals to have reviewed the entire world's literature; at that time 401 references dealing with lung -- cigarette smoking and lung cancer, and refuting any other theory, any other possible suggestion that any other cause could be related to smoking other than the dramatic rise in cigarette smoking that had occurred primarily during and after World War I when our boys went overseas to fight and smoked cigarettes, and that's when the dramatic rise in cigarettes occurred.

Q Are there other articles that you would like to comment on, that you think would be relevant to this study that's before us?

THE COURT: It's not a study, but he would like to comment on them if you thing it's appropriate. He's not controlling the lawsuit you are.

BY MR. SMITH:

Q Are there other articles, Dr. Blum, that you consider relevant to our discussion today that you would like to discuss that you think would be helpful to the jury?

MR. PROCTOR: I have an objection to that.

THE COURT: Well, sustained.

BY MR. SMITH:

Q Have you reviewed other articles for this particular testimony, Dr. Blum?

A Yes, sir, I have. I have a couple others.

Q And you cite articles in your report, correct?

A Yes, sir, I have.

Q Would you tell us of the next one, please?

THE COURT: These articles are cited for what purposes? Why are we listening to this?

BY MR. SMITH:

Q The relevance of the articles I'm asking you to look at is relevant to the question before us; that is where smoking, particularly smoking of cigarettes, causes lung cancer. Was that the focus of your report?

A The focus of what I did in researching the research on smoking in the first half of the 20th century, not just in preparation for this case but in what I do in the 40 years that I have worked on smoking, is to look carefully to see what we knew when, and what we did about it.

Q And you first began doing this approximately when, insofar as the years you have been looking at this topic?

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A I first started reading the medical literature about smoking when I was in high school, and reading the Journal of American Medical Association that my father gave me when the Surgeon General's report came out.

THE COURT: You were doing it primarily as a

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historian to see what was there historically?

THE WITNESS: No, this is in 64.

THE COURT: You are not an oncologist, you don't diagnose people with cancer; that's no in your framework?

THE WITNESS: No, sir.

THE COURT: You could have done this if you had never gone to medical school.

THE WITNESS: You asked me a question if I'm an oncologist. I diagnose people with cancer all the time.

THE COURT: All these studies you did you could have done, if you decided to be a sports editor you could have done the same thing.

THE WITNESS: I wanted to become a sports editor, your Honor.

THE COURT: That wasn't my question. You could have done it as a sports editor.

THE WITNESS: No. The fact is I couldn't have.

THE COURT: Because?

THE WITNESS: It requires a knowledge of the medical terminology, medical literature, epidemiology.

THE COURT: So you were doing it as a medical historian?

THE WITNESS: If we are talking about the

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history of smoking and lung cancer, this is medical history, yes, sir.

THE COURT: That's the point I'm trying to make. You are giving us what the history of this is based on your research, and when it first became obvious to the medical community in your opinion that there was a relationship between smoking and lung cancer.

THE WITNESS: Yes, sir.

THE COURT: All right. Let's go on.

MR. SMITH: Thank you, your Honor.

Q Are there other articles that you have reviewed and brought with you today to focus on that issue?

A There are several other articles that bear mention in the history of making the case that smoking and lung cancer was cemented by 1939 when Ochsner and DeBackey published in the Journal of the American Medical Association.

And the -- the importance, just to emphasize about Ochsner and DeBakey's 1941 article, because I am alleging that as early as 1939, and really as late as 1939, we fully knew in medical science, thanks to Dr. Ochsner, thanks to Dr. Lichint, thanks to Lombard and Doering, thanks to Dr. McNally, thanks to -- or the other left side of that time line we really had the knowledge, we really did he not know enough to say oh my gosh.

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THE COURT: When you use the word we, do you include tobacco companies?

THE WITNESS: Yes, sir.

THE COURT: All right. Let's move on, please.

THE WITNESS: I would certainly.

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THE COURT: Wait for another question.
THE WITNESS: Excuse me?
BY MR. SMITH:
Q Dr. Blum, do you have an opinion based upon your education and experience, which includes both serving as medical editor and being a Board Certified physician, as to whether or not the four defendants in this case, the American Tobacco Company, Philip Morris, Lorillard, and Liggett, knew in 1939, or in the exercise of reasonable care should have known in 1939, about a risk that was associated with their cigarettes and lung cancer?
A Yes, sir, most definitely.
MR. PROCTOR: Objection, your Honor. Lack of foundation.
THE COURT: Overruled.
BY MR. SMITH:
Q And your opinion is what?
A In 1939 the case was closed that smoking was the leading cause of lung cancer. It was far and away the explanation for the dramatic rise in lung cancer that we

were seeing. We, in the medical scientific community.
Q Dr. Blum, do you have an opinion based on your education and experience and your review of the medical literature, including the review of the medical literature to which you have referred, as to whether or not the American Tobacco Company, Philip Morris, Lorillard and Liggett should have issued warnings or instructions in 1939 as to the risks of smoking tobacco, particularly cigarettes, and insofar as its causing lung cancer is concerned?
A Yes, sir, absolutely.
Q And what is that opinion?
MR. PROCTOR: Objection, your Honor, lack of foundation.
THE COURT: Overruled.
THE WITNESS: These four defendant companies knew, as did every reader of every medical.
THE COURT: The question is not about knowledge, the question is about duty to warn.
BY MR. SMITH:
Q Should they have warned?
A Yes, sir, they had a duty, based on the medical scientific findings to that point, to warn the customers that were buying their products.
Q Do you have an opinion, based upon your education, experience, as to some of the things they should have done

at that time to accomplish that, or at least head in that direction?
A Yes, sir. Since they were advertising in radio, magazines, newspaper, and in the movies, those would be four media in which, if I were going to alert the customers that I was selling my product to and had faith and confidence in my product but wanted the customers to know what I knew, I would have used those media to reach my customers.
Q Do you have an opinion as to whether or not they should have done so?
A I believe they should have.
Q Dr. Blum, there has been mention of this particular book at other stages in this proceedings, but can you tell us what I'm holding?
A You are holding a textbook of oncology. Oncology has been used. It is the medical science of the study of

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cancers. And that textbook is edited by Dr. Vincent Divita, the former head of the National Cancer Institute, Samuel Hellman and Steven Rasenberg, two other researchers at the National Cancer Institute.

It is considered by all --

THE COURT: He didn't ask you that. He asked you what it was.

BY MR. SMITH:

Q Which edition is this?

A That's the fifth edition of the textbook of the cancer that most physicians refer to. It was a textbook I was invited to write the chapter on tobacco.

Q And this was published approximately when?

A 1997.

Q And was there an edition before that that you were involved in?

A Yes, sir.

Q Which one was that?

A 1994.

Q Can you show us the chapter that you did write, please?

A I'll look it up in the index.

Yes, sir.

Q Can you open it to that for us?

This is chapter 21, is that correct?

A Yes, sir.

Q And the title?

A Cancer Prevention. Preventing Tobacco Related Cancers.

Q And the author of it is?

A Alan Blum.

Q Were there any other chapters in this oncology book relating to tobacco related cancers?

A Tobacco related cancers are mentioned throughout the

book, this is the only chapter in the book that summarizes the prevention of tobacco related cancers. It is the overview of the subjects of tobacco in the textbook of oncology.

Q So if this was the chapter that was in effect devoted to tobacco, the related cancers?

A That was the one chapter that was devoted to it.

Q And this was a book published by oncologists?

A It is primarily used by cancer doctors, those that are in the field of oncology or oncologist. Others of us also use it. Those of us who are in family medicine, family physicians, interns, those in internal medicine; it can be used by medical students and physicians in training.

Q My understanding, were there any other family physicians who were asked to write chapters?

A To the best of my knowledge, sir, I'm the only family physician that was invited to write a chapter in that textbook.

Q And you did that in the fourth and fifth edition?

A They rotate authors, so I succeeded the head of the National Cancer Institution on cancer and tobacco. And the head of the Massachusetts Department of Health succeeded me, and he's an oncologist.

Q You indicated your opinion about the fact they should have warned in 1939. Have you obtained and collected

over -- well, I want to withdraw that for a minute.

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Tell us about your collection of advertisements and ads and articles and TV ads, radio ads, magazine ads. Tell us how long you have been doing that, first?

A Well, since again my dad, who was a family doctor, gave me the idea I have been collecting insidiously on cigarette advertising and tobacco and in all of its forms. And I now hold 2,500 archive boxes of items relating to the promotion of tobacco products.

Q And have you, at our request, called out some representative television advertisements or combination advertisements and TV shows that reflect the defendants in this case, insofar as the not only the defendants but the particular brands of cigarettes that David Tompkin smoked?

A Yes. I understand from the brand listing that I received which brands he smoked. I'm not certain I have that in front of me, but on the basis of that, I'm trying to put together from my collection of advertising examples that typify the advertisements during the time period in which he smoked.

To do that, I felt it was important to also provide a greater context, just as we are doing now in providing a context for the medical literature, by showing some of the popular advertising that was going on at the same time as the medical literature was being published.

So I felt it was important to go back a little bit in time as Mr. Tompkin was growing up to give a sense of what the advertising campaigns were all about.

Q Do you have -- we have a video here today, that we'll locate in a minute?

THE WITNESS: Your Honor, could I clarify a question? I think it is important. And I lost my train of thought. And with your permission it had to do with the date of 1941. I was in the middle of my mind of saying something about the case being clinched, in my opinion, in 1939, and yet I included a reference from 1941, two references in fact.

BY MR. SMITH:

Q Yes, sir?

A All, virtually all of the references in the 1941 article were 1939 and earlier. So it is extremely important for me to clarify that point when I'm alleging that we knew by 1939 what was going on with regard to the relationship between smoking and lung cancer.

Thank you.

What I thought.

Q I'll tell you what. Maybe --

A I would like to show the slides if that's possible.

Q Let's do that and then we'll worry about the individual?

MR. PROCTOR: Your Honor, I do have an objection to the slides and request a side bar.

(The following discussion was conducted at the side bar, between court and counsel, out of the hearing of the jurors, as follows:)

THE COURT: Yeah, go ahead.

MR. PROCTOR: Your Honor, you qualified Dr. Blum on only one topic, that's the duty to warn. He's already given his opinion on that. All of these advertising issues go to common knowledge issue, the consumer expectations which your Honor specifically ruled Dr. Blum was not qualified to testify on in the

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plaintiff's case in chief. He's already rendered his duty to warn based on the medical literature. The advertising issues don't go to that issue.

THE COURT: For what purpose do you want to put these in?

MR. SMITH: Your Honor, I guess I also would differ with one of the things Craig said. I believe your Honor indicated he was one of the world's leading authorities on advertising, or words to that effect. But we wanted to establish the climate that existed under which David Tompkin smoked, and that would go to the duty to warn, it would go to all those issues.

THE COURT: Well, is this the same thing as

you -- we watched in your opening statement?

MR. SMITH: You haven't seen the slides.

THE COURT: What do the slides show?

MR. SMITH: A variety of ads that came out of magazines, which is the climate.

THE COURT: And these ads are ones that don't include a duty to warn?

MR. SMITH: No, no. There is no warning in any of them.

THE COURT: And in what period of time are these ads?

MR. SMITH: During the 40s and 50s, maybe some into the early 60s.

THE COURT: What is the relevance, other than they were showing ads that did not contain a warning.

MR. SMITH: Well, your Honor, we would submit there is first, with respect to the duty to warn, they are saying, hey, everybody knew we didn't have to warn. This is the climate in which --

THE COURT: I don't understand what you mean by the climate, counselor, that phrase. They have conceded they did not warn.

MR. SMITH: They have not conceded; they say that everybody --

THE COURT: Well, I heard his opening statement

saying they found out the same time as consumer did there was a link between lung cancer and tobacco.

MR. SMITH: They are indicating the opposite here; they are indicating it is safe to smoke; don't worry about it.

THE COURT: Well, you consider this to be testimony within the framework that they had a duty to warn, and they weren't doing it.

MR. SMITH: I really consider it for all four issues.

THE COURT: Well, I was very clear I was going to restrict his testimony, that's in my opinion, and the counselor is right about that.

MR. SMITH: Well, we'll restrict it to duty to warn, that's whatever limited purpose.

MR. PROCTOR: I think it is highly prejudicial, your Honor, to put that in with regard to duty to warn when he's testified about the medical literature. The duty to warn is premised on the scientific knowledge that we have, and the ads don't go to the scientific knowledge that we have.

THE COURT: And he's offered the opinion that he -- you well knew you should have warned. Now you

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are going to have to wrestle with that.
MR. PROCTOR: Exactly.

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THE COURT: So you can't, you can't give me a limp leg here and object to what's going on because you didn't know, I'm not going to listen to that. You want to show these commercials from the standpoint? I think that they were the antithesis of a warning.
MR. SMITH: Yes, sir.
THE COURT: All right. How many are you going to show?
MR. SMITH: I believe he has around 30, 40.
THE COURT: Well, I have to be out of here at 4:00 o'clock, I have a very important telephone conference with all the judges of the alien terrorist court. I have to leave at 4:00, I'm not going to see 40. You pick your best 10.
MR. SMITH: I assume you are not going to ask him to -- limit him to the effect these ads may have had on the consumer, since he is not an expert on common knowledge, if he is not an expert in consumerism or consumer behavior where he was tendered as a medical witness with his scientific duty to warn.
Also on the experts on the ads for the pump that the judge just indicated.
THE COURT: Here is what I'm really concerned about your witness. You have tried to control him, but he is almost uncontrollable. Now, if he starts

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going off on some tangent, I'm going to shut him down. So you are on notice if he gets out of hand, that's your problem not mine. I'm going to shut him down and that's going to be the end of his examination. He's been an extremely difficult witness to handle. You have a problem, I have a problem. I want your issues very narrow on these slides, okay?
MR. SMITH: Yes, sir.
(A discussion was conducted at side bar, out of the hearing of the jurors, and off the record.)
(The following proceedings were conducted in open court.)
THE COURT: You can take the stand again, doctor.
BY MR. SMITH:
Q Dr. Blum --
THE COURT: I thought you said you had more questions.
MR. SMITH: I do, your Honor.
THE COURT: Then proceed with them, please.
MR. SMITH: May we show the video?
THE COURT: The video as opposed to slides?
MR. SMITH: I would like to do both, but I don't want to encroach on the time.

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THE COURT: The video is already the one you've shown to the jury?
MR. SMITH: Yes.
THE COURT: You would like him to authenticate that?
MR. SMITH: I would like to.
THE COURT: We can start it and he can say yep. You saw fit to show the entire video in opening

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statement. We are not going to show see it twice. He can say and I'll mark it as an exhibit.

MR. SMITH: There is a five minute segment at the end of it that has, in addition to these brands, that other ads that these companies put out regarding other cigarettes during the same time period.

THE COURT: You mean that don't involve the cigarette smoked here?

MR. SMITH: The precise cigarette, but involve their kin, the other brands.

THE COURT: Members of the jury, we are going to recess for the balance of the day. I obviously lost control of my courtroom. I have another matter at 4:00 o'clock.

In order to get this under control, we'll recess for the balance of the day. Recall my admonitions; do not discuss this case among yourself.

And drive carefully. Don't discuss it at home. And we'll see you at 9:00 o'clock tomorrow morning.

You may file out.

(The jurors withdrew from the courtroom, and the following proceedings were held in open court, outside the presence of the jury.)

THE COURT: Now, somehow show what you want to show to the jury. I don't want to go through the same slides that we saw in your opening statement.

MR. SMITH: No, it's the one after it, your Honor, it's about five minutes long.

Here we go, we are within that zone.

MR. COFER: Your Honor, for explanation, apparently we changed the machine, with the permission of the deputy clerk, because the cross examination materials couldn't run in that format. I apologize for any inconvenience. I did not realize this would cause a problem with Mr. Smith. We'll make sure we have someone in the courtroom to run it if this happens again. I apologize for the inconvenience.

THE COURT: Thank you.

(Video played.)

THE COURT: I'll be back when my conference call is over.

(Brief recess.)

THE COURT: Let the record show that we are not -- the jury is not in the courtroom. The jury has gone home.

I think when I left for my telephone conference, we were showing the additional five-minute tape that you wanted to show?

MR. SMITH: Yes, sir.

THE COURT: For what purpose? I mean, it was just more --

MR. SMITH: It just fleshes it out, that's what it does.

THE COURT: Fleshes out what?

MR. SMITH: The ads they were running then were contra, exact opposite of warning, for one thing.

THE COURT: How do you know even what dates those things are?

MR. SMITH: He's the one, Dr. Blum collected

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them.
THE COURT: He knows, he's able to describe when that Jack Benny show was portrayed?
MR. SMITH: He can say that they were -- those come from before 1965.
Is that correct, Dr. Blum?
THE WITNESS: Yes, sir.
MR. SMITH: They are all before '65, Your

Honor.
He also is able to pull out the ten slides. He can go ten slides, limited to ten. That's --
THE COURT: All right. Any further objection by defendants?
MR. PROCTOR: Yeah, Your Honor. The problem above and beyond the advertisement general objection made is none of these are cigarettes that Mr. Tompkin ever smoked. They are Newport, Lucky Strike, L and M and Marlboro, and Mr. Tompkin never smoked a single one of those ever.
MR. SMITH: That was the issue that was raised.
They are brands that -- they are cigarettes that were made by the same companies, same time zone, set the climate, which is really going the opposite direction as a warning.
THE COURT: Well, from whom am I going to get the testimony about who the manufacturers of those cigarettes were?
MR. SMITH: Can you tell him that?
THE WITNESS: Yes.
MR. SMITH: Dr. Blum, Your Honor.
THE COURT: You can qualify him as an expert to know who was manufacturing what cigarettes?

MR. SMITH: Based on all the collections that he did, Your Honor, I -- I wouldn't be --
MR. COFER: We will stipulate who made what brands.
Our issue is it's not relevant, and that this witness isn't qualified to talk about essentially consumer behavior.
But obviously we will stipulate that Philip Morris made Marlboro --
THE COURT: It's not consumer behavior.
I thought I would allow it in from the standpoint that in spite of his opinion that 1939 they should be giving a warning, they were running commercials that did not contain a warning.
Now, presumably that's not even a fact in dispute, but I gather plaintiff's counsel is concerned the jury will miss it if they don't see those commercials. So I'll let you show them.
You are using up some of your precious time to do that.
MR. SMITH: Yes, sir.
THE COURT: If that's the way you want to use your time, fine. I'm not going to try to be your counselor on how you use your time, but you only have 1200 minutes.
MR. SMITH: I would think five minutes would

be worth it, Your Honor, on this.
THE COURT: Fine. Fine. You are the master

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of your case.
Now, we are agreed on ten?
MR. SMITH: Yes, sir, he has ten.
THE COURT: Okay. We will start with that first thing in the morning.
Anything else to come before the Court tonight?
MR. MILLIMAN: Your Honor, just one housekeeping matter.
We would just like the Court to stipulate that the objection by one of the four defendants is an objection for all. Can we have that in the record?
THE COURT: Well, if you all agree to that?
MR. MILLIMAN: We do, Your Honor.
THE COURT: I want to hear everybody say that one -- that nobody is going to object if somebody else objects to the fact that they made an objection.
MR. COFER: I've never seen that happen, but I will say this: If that happens -- how about this? One objection inures to the benefit of all defendants unless --
THE COURT: Even if you don't like the fact of the objection?
MR. COFER: Yes.

THE COURT: All right. Because there are some times when lawyers decide the best thing they can do is be silent.
MR. COFER: I understand.
THE COURT: Other lawyers decide they should object about everything.
MR. COFER: Yeah, I understand that.
THE COURT: You have been a litigator long enough to know sometimes you let them run with stuff that's objectionable.
MR. COFER: I understand.
THE COURT: And --
MR. COFER: Hopefully we will be disciplined in our objections.
We want to make sure that if one --
THE COURT: When I was a county prosecutor, I used to love the defense counsel lead his witness before I got a chance to cross-examine him, because I would then engage in a cross-examine -- my cross-examination was a direct examination.
I made the witness testify rather than let -- I let the defense counsel run with his leading his defendant by the nose through his testimony. Then I'd cross-examine him just the reverse, then I'd ask the direct examination questions, and the witness would normally die

on the stand in front of me.
Those are all matters of strategy. I don't want to conduct a case on strategy, trial tactics. You fellows are the masters of your own case.
But what I understand is if one defendant objects, the rest of you are in total agreement with the objection, for the record?
MR. MILLIMAN: On behalf of our clients, yes, Your Honor.
THE COURT: Very well. That's the way it will be.
MR. MILLIMAN: So we don't have to all stand up?

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THE COURT: No, no, even if it's killing you, you are not going to tell me "I wish he hadn't objected."
MR. COFER: We may tell him that.
MR. MILLIMAN: We may tell him that later.
MR. COFER: We may tackle him.
THE COURT: All right. Okay.
MR. MILLIMAN: No objection unless we knock him down.
MR. COFER: One other housekeeping matter.
Mr. Smith is running into some witness problems, predictably because some of his witnesses are members of the Jewish faith and we are in the middle of

four Jewish holidays, and it's making it difficult for Mr. Smith to predict which witnesses will be available because, as I understand it, persons who testify tomorrow would have to be at their home by sundown.
Is that correct?
MR. SMITH: Yes, sir.
MR. COFER: So from a defense standpoint, we just need to have some idea who Mr. Smith is going to call because obviously we have a lot of materials back that we don't want to bring over if, for example, a witness isn't going to be here.
So --
THE COURT: Well, give them the best --
MR. SMITH: So far we have guessed right. You have our first one.
MR. COFER: Starts tomorrow?
THE COURT: Thursday is the tough day, right? Thursday is the holiday?
MR. SMITH: Yes.
MR. COFER: Starts Thursday? Sundown tomorrow?
MR. SMITH: Sundown tomorrow, sundown Thursday.
MR. COFER: Which means people can't travel, they must be home by sundown tomorrow.

Is that correct, Dr. --
THE WITNESS: Technically, yes.
MR. COFER: Okay.
THE COURT: I did get good news out of my telephone conference. Off the record. We don't need this on the record.
(Discussion had off the record).
THE COURT: Okay? Anything else?
MR. SMITH: No, sir.
THE COURT: 9:00 o'clock tomorrow morning.
MR. COFER: Thank you.
(Court adjourned)

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C E R T I F I C A T E

We certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

_____

S/ Susan Trischan, Official Court Reporter
Certified Realtime Reporter

_____

S/ Richard G. DelMonico, Official Court Reporter

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